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REPORTS OF CASES

DETERMINED IN THE

APPELLATE COURTS OF ILLINOIS

WITH A DIRECTORY OF THE JUDICIARY OF THE STATE,
CORRECTED TO JUNE 26, 1909.

VOL. CXLIV
A. D. 1909.

LAST FILING DATES OF REPORTED CASES:
FIRST DISTRICT, NOVEMBER 12, 1908;
SECOND DISTRICT, NOVEMBER 20, 1908.

EDITED BY
W. CLYDE JONES AND KEENE H. ADDINGTON,
AUTHORS OF JONES & ADDINGTON'S SUPPLEMENTS TO
STARR & CURTIS'S ANNOTATED ILLINOIS STATUTES.

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1909

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DIRECTORY OF THE JUDICIARY DEPARTMENT OF THE STATE OF ILLINOIS.

CORRECTED TO JUNE 26, 1909.

The judiciary department of the State of Illinois is composed of (1) the Supreme Court; (2) Appellate Courts; (3) Circuit Courts; (4) Courts of Cook County; (5) City Courts; (6) County and Probate Courts.

(1) THE SUPREME COURT.

The Supreme Court consists of seven justices, elected for a term of nine years, one from each of the seven districts into which the State is divided.

Formerly the State was divided into three grand divisions, Southern, Central and Northern, in which the terms were held, with one clerk for each of the three grand divisions elected for a term of six years, the court sitting at Mt. Vernon, Springfield and Ottawa.

In 1897 these divisions were consolidated into one, comprising the entire State, and provision made that all terms of the court be held in the city of Springfield, on the first Tuesday in October, December, February, April and June of each year.

REPORTER.

ISAAC N. PHILLIPS.....Bloomington.

JUSTICES.

First District—ALONZO K. VICKERS.....East St. Louis.

Second District—WILLIAM M. FARMER.....Vandalia.

Third District—FRANK K. DUNN.....Charleston.

Fourth District—*GUY C. SCOTT.....Aledo.

Fifth District—JOHN P. HAND.....Cambridge.

Sixth District—JAMES H. CARTWRIGHT.....Oregon.

Seventh District—ORRIN N. CARTER.....Chicago.

The Chief Justice is chosen by the court, annually, at the June term. The rule of the court is to select as successor to the presiding justice the justice next in order of seniority who has not served as Chief Justice within six years last past. Mr. Justice Farmer is the present Chief Justice.

CLERK.

J. McCAN DAVIS, Springfield.

LIBRARIAN.

RALPH H. WILKIN, Springfield.

* Died May 24, 1909.

(2) APPELLATE COURTS.

These Courts are held by Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One Clerk is elected in each district.

REPORTERS.

W. CLYDE JONES and KEENE H. ADDINGTON, of the law firm of Jones, Addington & Ames, 184 Monroe street, Chicago.

FIRST DISTRICT.

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

CLERK—Alfred R. Porter, Ashland Block, Chicago.

JESSE HOLDOM, Presiding Justice, Ashland Block, Chicago.

FRANK BAKER, Justice, Ashland Block, Chicago.

HENRY V. FREEMAN, Justice, Ashland Block, Chicago.

BRANCH APPELLATE COURT.*

FIRST DISTRICT.

AXEL CHYTRAUS, Presiding Justice, Ashland Block, Chicago.

JULIAN W. MACK, Justice, Ashland Block, Chicago.

FREDERICK A. SMITH, Justice, Ashland Block, Chicago.

APPELLATE COURTS—(CONTINUED.)

SECOND DISTRICT.

Composed of the counties of Boone, Bureau, Carroll, DeKalb, DuPage, Grundy, Henderson, Henry, Iroquois, Jo Daviess, Kane, Kankakee, Kendall, Knox, Lake, La Salle, Lee, Livingston, Marshall, McHenry, Mercer, Ogle, Peoria, Putnam, Rock Island, Stark, Stephenson, Warren, Whiteside, Will, Winnebago and Woodford.

Court sits at Ottawa, La Salle county, on the first Tuesdays in April and October.

CLERK—Christopher C. Duffy, Ottawa.

DORRANCE DIBELL, Presiding Justice, Joliet.

GEORGE W. THOMPSON, Justice, Galesburg.

HENRY B. WILLIS, Justice, Elgin.

THIRD DISTRICT.

Composed of the counties of Adams, Brown, Calhoun, Cass, Champaign, Christian, Clark, Coles, Cumberland, DeWitt, Douglas, Edgar, Ford, Fulton, Greene, Hancock, Jersey, Logan, Macon, Macoupin, Mason, McDonough, McLean, Menard, Montgomery, Morgan, Moultrie, Piatt, Pike, Sangamon, Schuyler, Scott, Shelby, Tazewell and Vermilion.

Court sits at Springfield, Sangamon county, on the third Tuesdays in May and November.

CLERK—W. C. Hippard, Springfield.

JAMES S. BAUME, Presiding Justice, Galena.

OLON PHILBRICK, Justice, Champaign.

LESLIE D. PUTERBAUGH, Justice, Peoria.

* This court is a branch of the Appellate Court of the first district, and is held by three judges of the Circuit Court, designated and assigned by the Supreme Court under the provisions of the act of the General Assembly, approved June 2, 1897. Hurd's Statutes, 1897, 508, Laws of 1897, 185.

FOURTH DISTRICT.

Composed of the counties of Alexander, Bond, Clay, Clinton, Crawford, Edwards, Effingham, Fayette, Franklin, Gallatin, Hamilton, Hardin, Jackson, Jasper, Jefferson, Johnson, Lawrence, Madison, Marion, Massac, Monroe, Perry, Pope, Pulaski, Randolph, Richland, Saline, St. Clair, Union, Wabash, Washington, Wayne, White and Williamson.

Court sits at Mount Vernon, Jefferson county, on the fourth Tuesdays in March and October.

CLERK—Albert C. Millspaugh, Mount Vernon.

HARRY HIGBEE, Presiding Justice, Pittsfield.

WARREN W. DUNCAN, Justice, Marion.

ROBERT B. SHIRLEY, Justice, Carlinville.

(3) CIRCUIT COURTS.

Exclusive of Cook county, the State of Illinois is divided into Seventeen Judicial Circuits, as follows:*

First Circuit.—The counties of Alexander, Pulaski, Massac, Pope, Johnson, Union, Jackson, Williamson and Saline.

JUDGES.

A. W. LEWIS, Harrisburg.

WARREN W. DUNCAN, Marion.

WILLIAM N. BUTLER, Cairo.

Second Circuit.—The counties of Hardin, Gallatin, White, Hamilton, Franklin, Wabash, Edwards, Wayne, Jefferson, Richland, Lawrence and Crawford.

JUDGES.

ENOCH E. NEWLIN, Robinson.

WILLIAM H. GREEN, Mt. Vernon.

JACOB R. CREIGHTON, Fairfield.

Third Circuit.—The counties of Randolph, Monroe, St. Clair, Madison, Bond, Washington and Perry.

JUDGES.

LOUIS BERNREUTER, Nashville.

GEORGE A. CROW, East St. Louis.

WILLIAM E. HADLEY, Collinsville.

Fourth Circuit.—The counties of Clinton, Marion, Clay, Fayette, Effingham, Jasper, Montgomery, Shelby and Christian.

JUDGES.

ALBERT M. ROSE, Louisville.

JAMES C. MCBRIDE, Taylorville.

THOMAS M. JETT, Hillsboro.

Fifth Circuit.—The counties of Vermilion, Edgar, Clark, Cumberland and Coles.

JUDGES.

WILLIAM B. SCHOLFIELD, Marshall.

E. R. E. KIMBROUGH, Danville.

MORTON W. THOMPSON, Danville.

Sixth Circuit.—The counties of Champaign, Douglas, Moultrie, Macon, DeWitt and Piatt.

JUDGES.

WILLIAM G. COCHRAN, Sullivan.

OLON PHILBRICK, Champaign.

WILLIAM C. JOHNS, Decatur.

Seventh Circuit.—The counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey.

JUDGES.

JAMES A. CREIGHTON, Springfield.

ROBERT B. STIRLEY, Carlinville.

OWEN P. THOMPSON, Jacksonville.

Eighth Circuit.—The counties of Adams, Schuyler, Mason, Cass, Brown, Pike, Calhoun and Menard.

JUDGES.

HARRY HIGBEE, Pittsfield.

ALBERT AKERS, Quincy.

GUY R. WILLIAMS, Havana.

Ninth Circuit.—The counties of Knox, Warren, Henderson, Hancock, McDonough and Fulton.

JUDGES.

GEORGE W. THOMPSON, Galesburg.

HARRY M. WAGGONER, Lewistown.

ROBERT J. GRIER, Monmouth.

Tenth Circuit.—The counties of Peoria, Marshall, Putnam, Stark and Tazewell.

JUDGES.

LESLIE D. PUTERBAUGH, Peoria.

THEODORE N. GREEN, Pekin.

NICHOLAS E. WORTHINGTON, Peoria.

Eleventh Circuit.—The counties of McLean, Livingston, Logan, Ford and Woodford.

JUDGES.

COLOSTIN D. MYERS, Bloomington.

GEORGE W. PATTON, Pontiac.

THOMAS M. HARRIS, Lincoln.

Twelfth Circuit.—The counties of Will, Kankakee and Iroquois.

JUDGES.

DORRANCE DIBELL, Joliet.

CHARLES B. CAMPBELL, Kankakee.

FRANK L. HOOPER, Watseka.

Thirteenth Circuit.—The counties of Bureau, LaSalle and Grundy.

JUDGES.

SAMUEL C. STOUGH, Morris.

RICHARD M. SKINNER, Princeton.

EDGAR ELDREDGE, Ottawa.

Fourteenth Circuit.—The counties of Rock Island, Mercer, Whiteside and Henry.

JUDGES.

WILLIAM H. GEST, Rock Island.

FRANK D. RAMSAY, Morrison.

EMERY C. GRAVES, Geneseo.

Fifteenth Circuit.—The counties of Jo Daviess, Stephenson, Carroll, Ogle and Lee.

JUDGES.

RICHARD S. FARRAND, Dixon.

JAMES S. BAUME, Galena.

OSCAR E. HEARD, Freeport.

Sixteenth Circuit.—The counties of Kane, Du Page, De Kalb and Kendall.

JUDGES.

HENRY B. WILLIS, Elgin.
DUANE J. CARNES, Sycamore.
MAZZINI SLUSSER, Downers Grove.

Seventeenth Circuit.—The counties of Winnebago, Boone, McHenry and Lake.

JUDGES.

ARTHUR H. FROST, Rockford.
CHARLES H. DONNELLY, Woodstock.
ROBERT W. WRIGHT, Belvidere.

(4) COURTS OF COOK COUNTY.

The State Constitution recognizes Cook county as one judicial circuit, and establishes the Circuit, Criminal and Superior Courts of said county. The Criminal Court has the jurisdiction of a Circuit Court in criminal and quasi-criminal cases only, and the judges of the Circuit and Superior Courts are judges, *ex officio*, of the Criminal Court.

CIRCUIT COURT.

CLERK—Joseph E. Bidwill, Jr., County Building, Chicago.

JUDGES.

GEORGE A. CARPENTER,
RICHARD S. TUTHILL,
JESSE A. BALDWIN,
FRANK BAKER,
KICKHAM SCANLAN,
THOMAS G. WINDES,
MERRITT W. PINCKNEY,

JOHN GIBBONS,
ADELOR J. PETTIT,
LOCKWOOD HONORE,
GEORGE KERSTEN,
JULIAN W. MACK,
FREDERICK A. SMITH,
CHARLES M. WALKER.

SUPERIOR COURT.

CLERK—Charles W. Vail, County Building, Chicago.

JUDGES.

WILLIAM H. MCSURELY,
BEN M. SMITH,
THEODORE BRENTANO,
GEORGE A. DUPUY,
ALBERT C. BARNES,
ARTHUR H. CHETLAIN,

HENRY V. FREEMAN,
FARLIN Q. BALL,
AXEL CHYTRAUS,
JESSE HOLDOM,
MARCUS A. KAVANAGH,
WILLARD M. MCEWEN.

(5) CITY COURTS.

City Courts existing prior to the Constitution of 1870 were continued until abolished by the qualified voters of the city. These courts may now be established under Sec. 21 of Chap. 37, R. S., and when so established have jurisdiction as defined by Sec. 1 of an act entitled "An Act in relation to courts of record in cities," approved May 10, 1901.

THE CITY COURT OF ALTON.

JAMES E. DUNNEGAN, Judge. S. F. CONNOR, Clerk.

THE CITY COURT OF AURORA.

EDWARD M. MANGAN, Judge. EDWARD O. PETERSON, Clerk.

THE CITY COURT OF CANTON.

P. W. GALLAGHER, Judge. W. S. GLEASON, Clerk.

THE CITY COURT OF CHICAGO HEIGHTS.

HOMER ABBOTT, Judge. EDWARD H. KIRGIS, Clerk.

THE CITY COURT OF EAST ST. LOUIS.

W. J. N. MOYERS,
M. MILLARD, Judges. THOMAS J. HEALY, Clerk.

THE CITY COURT OF ELGIN.

EDWARD M. MANGAN, Judge. CHARLES S. MOTE, Clerk.

THE CITY COURT OF LITCHFIELD.

PAUL MCWILLIAMS, Judge. HARRY L. BALLARD, Clerk.

THE CITY COURT OF MATTOON.

VACANCY. THOMAS M. LYTLE, Clerk.

THE CITY COURT OF PANA.

JOSIAH P. HODGE, Judge. G. W. MARSLAND, Clerk.

THE CITY COURT OF ZION CITY.

V. V. BARNES, Judge. O. L. SPRECHER, Clerk.

MUNICIPAL COURT OF CHICAGO.

Established by Act of May 18, 1905 (L. 1905, p. 158).

CHIEF JUSTICE.

HARRY OLSON.

ASSOCIATE JUDGES.

FREEMAN K. BLAKE	JOHN W. HOUSTON	HENRY C. BEITLER
WILLIAM W. MAXWELL	JOHN H. HUME	MAX EBERHARDT
JUDSON F. GOING	JOHN R. NEWCOMER	FREDERICK L. FAKE, JR.
WILLIAM N. GEMMILL	MCKENZIE CLELAND	CHARLES N. GOODNOW
WILLIAM N. COTTRELL	JOHN C. SCOVILLE	OSCAR M. TORRISON
EDWIN K. WALKER	STEPHEN A. FOSTER	HOSEA W. WELLS
EDWARD A. DICKER	FRANK CROWE	SHERIDAN E. FRY
ISIDORE H. HIMES	MANCHA BRUGGEMEY-	HUGH R. STEWART
ARNOLD HEAP	ER	JOSEPH Z. UHLIR
	MICHAEL F. GIRTEN	

(6) COUNTY AND PROBATE COURTS.

In the counties of Cook, Kane, La Salle, Peoria, Sangamon, St. Clair and Will, each having a population of over 70,000, probate courts are established, distinct from the county courts. In the other counties the county courts have jurisdiction in all matters of probate. (Laws 1881, 72.)

JUDGES.	COUNTIES.	COUNTY SEATS.
CHARLES B. McCRORY.....	Adams.....	Quincy.
WILLIAM S. DEWEY.....	Alexander.....	Cairo.
WM. H. DAWDY.....	Bond.....	Greenville.
WM. C. DE WOLF.....	Boone.....	Belvidere.
WILLARD Y. BAKER.....	Brown.....	Mt. Sterling.
JOE A. DAVIS.....	Bureau.....	Princeton.
F. I. BIZAILLON.....	Calhoun.....	Hardin.
JOHN D. TURNBAUGH.....	Carroll.....	Mt. Carroll.
DARIUS N. WALKER.....	Cass.....	Virginia.
THOMAS J. ROTH.....	Champaign.....	Urbana.
JAMES H. MORGAN.....	Christian.....	Taylorville.
HERSHEL R. SNAVELY.....	Clark.....	Marshall.
ALSIE N. TOLLIVER.....	Clay.....	Louisville.
JAMES ALLEN.....	Clinton.....	Carlyle.
T. N. COFER.....	Coles.....	Charleston.
LEWIS RINAHER.....	Cook.....	Chicago.
CHARLES S. CUTTING, Pro. J..	Cook.....	Chicago.
JOHN C. MAXWELL.....	Crawford.....	Robinson.
A. L. RUFFNER.....	Cumberland.....	Toledo.
WILLIAM L. POND.....	DeKalb.....	Sycamore.
FRED C. HILL.....	DeWitt.....	Clinton.
W. J. DOLSON.....	Douglas.....	Tuscola.
CHARLES D. CLARK.....	DuPage.....	Wheaton.
WALTER S. LAMON.....	Edgar.....	Paris.
ISAAC W. IBBOTSON.....	Edwards.....	Albion.
MICHAEL O'DONNELL.....	Effingham.....	Effingham.
JOHN H. WEBB.....	Fayette.....	Vandalia.
H. H. KERR.....	Ford.....	Paxton.
T. J. MYERS.....	Franklin.....	Benton.
JOHN D. BRECKENRIDGE.....	Fulton.....	Lewistown.
W. S. PHILLIPS.....	Gallatin.....	Shawneetown.
THOMAS HANSHAW.....	Greene.....	Carrollton.
GEORGE W. HUSTON.....	Grundy.....	Morris.
JOHN M. ECKLEY.....	Hamilton.....	McLeansboro.
CHARLES A. JAMES.....	Hancock.....	Carthage.
JOHN H. FERRELL.....	Hardin.....	Elizabethtown.
RUFUS F. ROBINSON.....	Henderson.....	Oquawka.
ALBERT E. BERGLAND.....	Henry.....	Cambridge.
JOHN H. GILLAN.....	Iroquois.....	Watseka.
WILLARD F. ELLIS.....	Jackson.....	Murphysboro.
PAUL WILLIAMS.....	Jasper.....	Newton.
ANDREW D. WEBB.....	Jefferson.....	Mt. Vernon.
THOMAS F. FERNS.....	Jersey.....	Jerseyville.
WILLIAM RIPPIN.....	Jo Daviess.....	Galena.
WILLIAM A. SPANN.....	Johnson.....	Vienna.
FRANK G. PLAIN.....	Kane.....	Geneva.
JOHN H. WILLIAMS, Pro. J..	Kane.....	Geneva.
ARTHUR W. DESELM.....	Kankakee.....	Kankakee.
WILLIAM HILL.....	Kendall.....	Yorkville.
R. C. RICE.....	Knox.....	Galesburg.

JUDGES.	COUNTIES.	COUNTY SEATS.
DEWITT L. JONES.....	Lake.....	Waukegan.
WILLIAM H. HINEBAUGH.....	La Salle.....	Ottawa.
ALBERT T. LARDIN, Pro. J....	La Salle.....	Ottawa.
JASPER A. BENSON.....	Lawrence.....	Lawrenceville.
ROBERT H. SCOTT.....	Lee.....	Dixon.
ULYSSES W. LOUDERBACK.....	Livingston.....	Pontiac.
DONALD MCCORMICK.....	Logan.....	Lincoln.
ORPHEUS W. SMITH.....	Macon.....	Decatur.
JOHN B. VAUGHN.....	Macoupin.....	Carlinville.
JOHN E. HILLSKOTTER.....	Madison.....	Edwardsville.
JOHN S. STONECIPHER.....	Marion.....	Salem.
DANIEL H. GREGG.....	Marshall.....	Lacon.
JAMES A. MCCOMAS.....	Mason.....	Havana.
LANNES P. OAKES.....	Massac.....	Metropolis.
WILLIAM J. FRANKLIN.....	McDonough.....	Macomb.
DAVID T. SMILEY.....	McHenry.....	Woodstock.
ROLLAND A. RUSSELL.....	McLean.....	Bloomington.
GEORGE B. WATKINS.....	Menard.....	Petersburg.
HENRY E. BURGESS.....	Mercer.....	Aledo.
LOUIS ARNS.....	Monroe.....	Waterloo.
JOHN L. DRYER.....	Montgomery.....	Hillsboro.
FRANCIS E. BALDWIN.....	Morgan.....	Jacksonville.
E. D. HUTCHINSON.....	Moultrie.....	Sullivan.
FRANK E. REED.....	Ogle.....	Oregon.
WILBERT I. SLEMMONS.....	Peoria.....	Peoria.
LEANDER O. EAGLETON, Pro. J.	Peoria.....	Peoria.
MARION C. COOK.....	Perry.....	Pinckneyville.
ELIM J. HAWBAKER.....	Piatt.....	Monticello.
PAUL F. GROTE.....	Pike.....	Pittsfield.
WILLIAM A. WHITESIDE.....	Pope.....	Golconda.
LYMAN G. CASTER.....	Pulaski.....	Mound City.
HENRY C. MILLS.....	Putnam.....	Hennepin.
S. LOVEJOY TAYLOR.....	Randolph.....	Chester.
JOHN A. MACNEIL.....	Richland.....	Olney.
ROBT. W. OLMSTED.....	Rock Island.....	Rock Island.
ALBERT E. SOMERS.....	Saline.....	Harrisburg.
G. W. MURRAY.....	Sangamon.....	Springfield.
HENRY A. STEVENS, Pro. J....	Sangamon.....	Springfield.
WM. H. DIETERICH.....	Schuyler.....	Rushville.
JAMES CALLANS.....	Scott.....	Winchester.
J. K. P. GRIDER.....	Shelby.....	Shelbyville.
BRADFORD F. THOMPSON.....	Stark.....	Toulon.
JOHN B. HAY.....	St. Clair.....	Belleville.
FRANK PERRIN, Pro. J.....	St. Clair.....	Belleville.
ANTHONY J. CLARITY.....	Stephenson.....	Freeport.
JESSE BLACK, JR.....	Tazewell.....	Pekin.
MONROE C. CRAWFORD.....	Union.....	Jonesboro.
LAWRENCE T. ALLEN.....	Vermilion.....	Danville.
JOHN A. LOPP.....	Wabash.....	Mt. Carmel.
J. W. CLENDENIN.....	Warren.....	Monmouth.
VACANCY.....	Washington.....	Nashville.
JOHN R. HOLT.....	Wayne.....	Fairfield.
JULIUS C. KERN.....	White.....	Carmi.
HENRY C. WARD.....	Whiteside.....	Morrison.
GEORGE J. COWING.....	Will.....	Joliet.
JOHN B. FITHIAN, Pro. J.....	Will.....	Joliet.
W. F. SLATER.....	Williamson.....	Marion.
LOUIS M. RECKHOW.....	Winnebago.....	Rockford.
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CASES
DETERMINED IN THE
FIRST DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS
DURING THE YEAR 1908.

**Royal League v. Alvina Kasey, Appellant, Annie J.
Straw and Cynthia A. Kasey, Appellees.**

Gen. No. 13,986.

FRATERNAL BENEFIT SOCIETY—*who entitled to proceeds of certificate.*
Assuming that if a member of a fraternal benefit society dies leaving a certificate payable to a beneficiary designated as wife such person is not entitled to the proceeds of such certificate if before the death of such member she has become divorced from him and has ceased to be a "dependent;" nevertheless, the wife of such member who has become such since his divorce, is not entitled to the proceeds of such certificate without having been made a beneficiary thereof, but where the by-laws of the society contain a provision as follows: "If at the time" (of the member's death) "the dependency has ceased, then such benefit shall be paid to the heirs of the member," the proceeds of the certificate will pass according to such by-law.

Bill of interpleader. Appeal from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed October 8, 1908.

Statement by the Court. The decree from which this appeal was taken finds the facts and applies the law to them in its ordering clauses and in certain conclusions of law. There is no dispute concerning the facts in the cause, which was tried on a stipulated statement. Therefore an abstract of the decree will substantially serve the purpose of a complete state-

ment of the pleadings and the certificate of evidence, as well as of the action of the court.

The findings of fact in the decree are these:

That the Royal League, complainant, is a fraternal benefit society, organized and doing business under and by virtue of the laws of the State of Illinois, and that on April 5, 1890, it issued its benefit certificate to one Frank J. Kasey, a member of said order, and agreed thereby to pay out of its Widows' and Orphans' Benefit Fund to "Annie J. Kasey, wife," a sum not exceeding four thousand dollars, in accordance with the laws governing said fund, upon the death of said member; that prior to said Frank J. Kasey becoming a member of said Royal League there was born of the marriage of said Frank J. Kasey and the defendant, Annie J. Straw, then Annie J. Kasey, during July, 1887, a daughter, the defendant, Cynthia A. Kasey, who is now living, and who was the only child of said Frank J. Kasey living at the time of his death.

That on or about July 19, 1902, the said Annie J. Kasey was divorced from said Frank J. Kasey.

That on January 21, 1906, the said Frank J. Kasey married the defendant, Alvina Kasey, who lived thereafter with him as his wife until his death.

That upon the death of said Frank J. Kasey the said defendants, Annie J. Kasey (now Annie J. Straw), the beneficiary named in said benefit certificate, Cynthia A. Kasey, daughter and the heir at law of said Frank J. Kasey, deceased, and Alvina Kasey, the widow of said Frank J. Kasey, deceased, respectively, made claim upon said Royal League for the amount of money owing under said benefit certificate; and, thereupon, the said Royal League filed its bill of interpleader herein, making said claimants parties defendant thereto, and each of said parties appeared and answered said bill and laid claim to the amount of money secured by said benefit certificate; that on June 20, 1907, a decree was duly entered by the court, in

favor of the complainant in said bill of interpleader, and directing it to pay to the clerk of the Circuit Court the sum of \$4,000, admitted to be owing by it under said benefit certificate, and that said sum was thereupon deposited with the clerk of said court; that upon said deposit being made, an order was duly entered, by consent of all said parties, directing the clerk of said court to pay to the complainant, Royal League, the sum of \$15.85, being the amount expended by said complainant for court costs in filing its said bill of interpleader and for the service of summons upon said defendants.

That at the date, April 5, 1900, on which the Royal League issued its benefit certificate to Frank J. Kasey, in which the defendant, Annie J. Straw, then Annie J. Kasey, was named as beneficiary, she was the lawful wife of said Frank J. Kasey, and that there was born of said marriage during the month of July, 1887, a daughter, the defendant, Cynthia A. Kasey, who is the only heir at law of said Frank J. Kasey, deceased. That on July 19, 1902, the defendant, Annie J. Straw, formerly Annie J. Kasey, and prior to that time wife of said Frank J. Kasey, was divorced from said Frank J. Kasey, upon her bill of complaint, and solely on account of the fault of said Frank J. Kasey; and that since the death of said Frank J. Kasey and the bringing of this suit the said defendant, Annie J. Straw, has assigned all her interest in said benefit certificate and fund to the defendant, Cynthia A. Kasey.

That the said Frank J. Kasey was lawfully married to the defendant Alvina Kasey on January 21, 1906, and thereafter they lived together as husband and wife until the death of said Frank J. Kasey on December 5, 1906; and that his widow, Alvina Kasey, his daughter, Cynthia A. Kasey, and his divorced wife, Annie J. Straw, survive him.

That at no time has there been a by-law or rule in force in said Royal League relating to the payment of the benefit in the event of the beneficiary named in the

benefit certificate becoming divorced from the insured member. That the by-laws of said Royal League, during the entire period of the membership of said Frank J. Kasey, did provide that a benefit certificate might be made payable to a member's wife, children, father, mother, brother, sister, affianced wife, uncle, aunt, niece, nephew or grandchildren, in which class of beneficiaries no proof of dependence should be required. That a member might, at any time, surrender, in writing, his benefit certificate, and have a new one issued, payable to a different beneficiary of the eligible classes, upon the payment of a certificate fee of fifty cents; and that in the event of the death of the designated beneficiary before the death of the member, and no other beneficiary being named by the member, the benefit should be paid to the heirs at law of the member.

That the defendant, Annie J. Straw, is the same person mentioned in said certificate as Annie J. Kasey. That at the time of the death of said Frank J. Kasey said Annie J. Straw was not actually dependent upon him for support.

The conclusions of law found in the decree are:

That Alvina Casey was never designated by said Frank J. Kasey as a beneficiary and has no right to said fund.

That Cynthia A. Kasey was never designated by said Frank J. Kasey as beneficiary. (*Note: We call this a conclusion of law only out of greater caution, in the view that it may be considered tantamount to a finding that Cynthia A. Kasey could have no claim to the fund except as the assignee of Annie J. Straw, which, as will hereafter be seen, is contrary to a contention of said Cynthia A. Kasey. There is no dispute, however, of the proposition that no direction or order of Frank J. Kasey ever made Cynthia A. Kasey the beneficiary or changed in any way the original terms of the certificate.*)

That at the time of the death of said Frank J. Kasey, although said Annie J. Straw was not actually depend-

ent upon him for support, she was entitled to support from him. That by securing a divorce from said Frank J. Kasey, she did not preclude herself from taking the fund mentioned in said certificate. That therefore she, as the designated beneficiary mentioned in said certificate, was entitled, from and after the death of said Frank J. Kasey, to receive and dispose of the fund in said benefit certificate mentioned.

The ordering clause of the decree adjudges and decrees that Alvina Kasey is not entitled to said benefit fund or any portion thereof; that said Cynthia A. Kasey is entitled to said fund, and that the clerk of the court pay to her or to her solicitor the sum of three thousand nine hundred and eighty-four dollars and fifteen cents (\$3,984.15) so paid over to him by the Royal League under the terms of the decree heretofore entered, and that the defendant Alvina Kasey take nothing by this suit.

It seems only necessary to add to this abstract of the decree, as a basis for the discussion of the contentions of the respective parties, a statement of the claim of Cynthia A. Kasey as made by her answer to the bill of interpleader, and of the circumstances of the assignment to her and of its proof.

The answer of Cynthia A. Kasey, filed March 16, 1907, after admitting the facts which were recited in the bill of interpleader substantially as found by the decree, avers that by operation of law under the provisions of the by-laws of the complainant, the amount of the benefit certificate was payable to her, Cynthia A. Kasey, as the only heir of the deceased, Frank A. Kasey.

Annie J. Straw and Alvina Kasey each claimed the fund for herself by her answer. Annie J. Straw's answer was filed contemporaneously with her daughter's on March 16, 1907; Alvina Kasey's two days later, on March 18, 1907.

The order allowing the Royal League to pay the fund into court was made with the consent of all the

parties on June 20, 1907, after which, on the same day, the cause proceeded to hearing before the chancellor on the respective claims of Annie J. Straw, Alvina Kasey and Cynthia A. Kasey, who were each represented by counsel.

A stipulation of facts signed by the respective solicitors for the three claimants was read to the court, and thereupon, after argument of counsel, the court continued the cause for further hearing.

On July 11, 1907, both Annie J. Straw and Cynthia A. Kasey amended their answers, each amendment setting up the fact that on June 28, 1907, Annie J. Straw assigned her right, title and interest in the certificate in question and all rights and benefits that might accrue under any decree in the suit to Cynthia A. Kasey, and containing a copy of said assignment signed by Annie J. Straw, and expressed to be for the consideration of \$1 and other good and valuable consideration.

On the 13th of July, 1907, leave was given to the solicitor of Alvina Kasey to file the written stipulation of facts which had been read at the hearing *nunc pro tunc* as of the date of that hearing, June 20, 1907, which was accordingly done.

The stipulation begins with the agreement that "all proper pleadings necessary to present the claims of the respective parties are and shall be considered as now on file, and that on the trial of the issues presented by the pleadings the following facts are admitted to be true and shall be received and considered as if testified to by competent witnesses."

September 16, 1907, Alvina Kasey filed "answers to the amendments" of Annie J. Straw and Cynthia A. Kasey, which were filed July 11, 1907. These "answers" first denied the assignment and the execution of the same by Annie J. Straw, and then alleged "that on the 20th day of June, 1907, the said Annie J. Straw, Cynthia A. Kasey and this defendant, Alvina Kasey, stipulated with each other in writing that only those facts which were contained in said stipulation should

be presented to the court for its decision; that said stipulation was filed in said cause on the 20th day of June, 1907; * * * that upon the said stipulation and the facts therein contained, the cause was argued and partly presented to the court for its decision, and that the facts alleged in the amendment filed by said Annie J. Straw on July 11, 1907, are not contained in or referred to by said stipulation. By reason whereof, the defendant, Alvina Kasey, alleges the said Annie J. Straw is estopped from setting up or proving the facts alleged in her said amendment of July 11, 1907, and the defendant, Alvina Kasey, claims the same benefit of the answer as if she had demurred to the amendment."

After these answers, the cause coming on again for a continuance of the hearing, the assignment in question was offered in evidence and the signature proven. Whereupon it was objected to by counsel for Alvina Kasey on the ground that by the stipulation of facts on file it was agreed that all the pleadings necessary to present the facts and issues in the case should be considered on file as of the date of that stipulation, and that the hearing of the cause should be on the facts submitted in that written stipulation.

The court admitted the assignment in evidence over objection. No other evidence than that pertaining to the assignment and that contained in the stipulation of facts was heard.

The final decree here appealed from was entered on said 16th day of September, 1907.

The appeal is taken by Alvina Kasey, Cynthia A. Kasey being named as appellee in the appeal bond, and the assignments of error contain these points:

That the decree is contrary to the evidence; that it is based on evidence improperly admitted and considered; that it is erroneous in finding that at the time of the death of Frank J. Kasey his divorced wife, Annie J. Straw, was entitled to support from him; that it is erroneous in finding that by securing a di-

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voice from Frank J. Kasey, Annie J. Straw did not preclude herself from taking the fund mentioned in said certificate, and was therefore, as the designated beneficiary in said certificate, entitled to receive and dispose of the said fund; that it is erroneous in finding that since the death of said Frank J. Kasey, and the bringing of the suit, Annie J. Straw had assigned all her interest in the certificate and fund to Cynthia A. Kasey; that it is erroneous in finding that Alvina Kasey was never designated by said Frank J. Kasey as beneficiary, and erroneous in finding that Cynthia A. Kasey was and Alvina Kasey was not entitled to the fund, and adjudging that the amount of it should be paid to Cynthia A. Kasey, and that Alvina Kasey should take nothing by the suit.

BURTON & KANNALLY, for appellant.

J. L. BAILEY, J. R. GUILLIAMS and MILLARD R. POWERS, for appellees.

MR. JUSTICE BROWN delivered the opinion of the court.

The counsel for the appellant in this case, Alvina Kasey, in an able and ingenious argument, first address themselves to the proposition that Annie J. Straw is ineligible to take the fund which is the proceeds of the benefit certificate involved, and is now in the hands of the court. They then proceed, having, as they claim, disposed of the pretensions of Annie J. Straw, to inquire whether Alvina Kasey should not be held entitled to it.

But we think the proper consideration of this case requires a reversal of this order of discussion.

The fund has been paid into court by the Royal League in accordance with an order based on the prayer of its bill. Whether the interpleading proceedings proceeded in the most artificial manner according to the formerly recognized rule of equity prac-

tice and procedure, may be doubted; but no question was made of this, and indeed we regard the preface to the stipulated statement of facts to have been intended to provide that the answers of the respective parties to the bill of interpleader should be considered and taken as their affirmative pleadings or bills demanding against the other claimants, as defendants, the fund in question. Alvina Kasey's answer, then, was in essence her bill against the Royal League, Annie J. Straw and Cynthia A. Kasey. The essential findings of the decree, so far as she was concerned, except the preliminary ones about the issuance of the certificate, were only that Frank J. Kasey was lawfully married to her on January 21, 1906, that they lived together as husband and wife until the death of Frank J. Kasey on December 5, 1906, that she as his widow survives him, that she was made a party to the bill of interpleader, that she answered the bill, claiming the money involved, that the by-laws of the Royal League provided a method of changing the designated beneficiary, and that she was never designated by Frank J. Kasey as a beneficiary and has no right to the fund.

The ordering part of the decree which affects her, is "that Alvina Kasey is not entitled to said benefit fund or any portion thereof," "and that the defendant Alvina Kasey take nothing by this suit."

In other words, the situation made by the decree is tantamount to a dismissal of an original bill by her for want of equity, and relief against other persons granted to a defendant in that bill who had filed a cross-bill. Each answer to the bill of interpleader was equivalent not only to an original bill, but also to an answer to bills of the other defendants and a cross-bill in behalf of the defendant who signed it.

Alvina Kasey having been thus dismissed out of court has appealed. Manifestly, the only question with which she is concerned is whether her claim was

properly disposed of by the decree. If it was, she has no longer any interest in the fund or the litigation.

If between the other claimants to the fund, or between any one of them and the original party who asked for an order of interpleader, there was error committed by the decree, it was error immaterial to her.

If the fund should have been given to her, she has just cause of complaint; if not, it is no concern of her's to whom the court below decreed it as between the other claimants, and in the absence of any appeal or cross-error by any one of the other parties, no concern of this court.

Such being our view, the question before us is whether the benefit certificate in question can be held payable to "Alvina Kasey, wife," when by its terms it is payable to "Annie J. Kasey, wife." Counsel for Alvina Kasey insist that it can and should be so held because the word "wife" must be considered the essential and abiding part of the certificate, which is to speak as at the time of the death of the member. The name, they say, should be considered as the mere designative description, which may and should be held of lesser and uncontrolling importance. That this is so, they claim, is shown by inference from the intentions which can be gathered from the object and purposes of the League as shown by its certificate of incorporation and the changes made in its objects after its institution, by its constitution and laws, and by the order in which the allowed beneficiaries are enumerated, and also by the form of the application of Frank J. Kasey for the privileges of membership, and the order in which he therein placed the words. The certificate is payable to "Annie J. Kasey, wife;" the application, however, orders the benefit paid to "wife, Annie J. Kasey;" and counsel argue "Annie J. Kasey" is "in apposition to 'wife'"—the relation being the essential thing, and the use of the words "Annie J. Kasey" being merely a description of that

relation. This is confirmed, they say, by the fact that the laws of the state and of the order which allow and indeed prefer the actual wife or widow as a beneficiary, do not allow a divorced wife who is not dependent (that being the status of "Annie J. Straw" formerly "Kasey") at the time of the death of the member—when the certificate speaks—to be such a beneficiary.

The argument is well and strongly put, but it does not convince us. If the name were a mistake, if there had been no such person as Annie J. Kasey occupying the relation of wife to Frank J. Kasey when the certificate was applied for and issued, or even had the deceased after the divorce shown in any manner an intention or wish to change the provision and alter the beneficiary, the question would have been different. But his intention to name as his beneficiary not merely his "wife," but the particular person who was his wife at the time he made the application, and to order the benefit paid to "Annie J. Kasey, wife," seems clear; and the facts that the divorce was for his fault, that he had an infant daughter whom he allowed his divorced wife to support entirely after four months from the divorce, never contributing anything to the support of either mother or daughter after that time, but, as it would appear, retaining his membership in the Order, although his former wife, for whose benefit the certificate was issued, had possession of it (for although the stipulation only admits that at the time of making it Annie J. Straw had possession of it, there is no suggestion that this possession did not date from before the divorce), would seem to us to point strongly to the inference that he preferred to leave this fund for the benefit at least indirectly of the child for whom he was responsible, than to his second wife, whom it was easy to have made the beneficiary had he been so disposed.

Whether, however, this be so or not, and whether he could, by any intention, action or want of action of his, have enabled Annie J. Straw to remain a beneficiary

after she had ceased to be of any one of the classes from which beneficiaries could be named, are really immaterial questions, when the issue is whether Alvina Kasey is such beneficiary.

If she be not, she cannot take this fund, and the decree as to her is correct, and it is not necessary to discuss the conflict of authority as to whether the validity of the original designation of the beneficiary as Annie J. Kasey, now Straw, resulted in its continuing valid after the divorce. We may, in such case, assume that the doctrine of *Tyler v. Odd Fellows*, etc., 145 Mass. 134, is correct, and that it is adopted in this state by the decision and opinion in *Murphy v. Nowak*, 223 Ill. 311, "that a person cannot take as beneficiary unless he falls within one of the designated classes at the time of the death of the member," without its affecting the proper disposition of the case at bar.

We think that Alvina Kasey was not the beneficiary at any time; that the court below rightly so held, and that she could take nothing by her claim on the funds set forth in her answer to the bill of interpleader, nor by her appeal here.

As before noted, it is our opinion that this disposes of the contentions in which she had any interest, and that it is not necessary to pass on the assignments of error on the decree, which simply question the correctness of the findings concerning the right of Annie J. Straw to support from her former husband at the time of his death, or her right to dispose of the fund in question, or the right of Cynthia A. Kasey to the same. If those findings are erroneous, the errors do not concern appellant.

It may, however, be more satisfactory to the parties if we briefly state our view of them. Assuming that Annie J. Straw, as counsel claim, withdrew herself from the class of possible beneficiaries when she procured the divorce, and that she was not entitled to receive the fund, and that the doctrine of *Tyler v. Odd Fellows Assn.*, 145 Mass. 134, and *Order of Railway*

Conductors v. Koster, 55 Mo. App. 186, goes to the full extent claimed by appellant and that it was adopted in *Murphy v. Nowak*, 223 Ill. 301, we do not think that Cynthia A. Kasey's right to this fund thereby falls.

It is true that the court below by its findings appears to rest the adjudication of the fund to Cynthia A. Kasey on the assignment of it to her by Annie J. Straw, but the ordering portion of the decree makes no mention of the capacity in which Cynthia A. Kasey is entitled to the fund; and, as we have indicated, our opinion is that in the absence of any appeal or cross errors or objection of any kind from Cynthia A. Kasey, she is entitled to an affirmance of the decree, whatever error immaterial to the appellant is found therein in its findings or in its reasons given for the ordering portion.

Assuming that neither Alvina Kasey nor Annie J. Straw was entitled to the fund at the time of Frank J. Kasey's decease, we think Cynthia A. Kasey was.

The certificate was made payable to Annie J. Kasey when she was not only the wife, but, as his wife, a dependent of Frank J. Kasey. There is no doubt that if she had remained a dependent she would have been an eligible beneficiary at the time of Frank J. Kasey's death. The court found that she was entitled to support from him at the time of his death, and presumably meant to imply that this made her a "dependent." But assume that she was not, that the stipulation of facts foreclosed the hypothesis that she was, and that the laws of the order that "no benefit shall be payable to any person upon the ground of dependency alone unless the dependency exists at the time of the member's death," is conclusive against her right to take as a dependent—what then becomes of the fund? The immediately succeeding words in the laws of the order seem to us to furnish the answer: "If at the time" (of the member's death) "the dependency has ceased, then such benefit shall be paid to

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the heirs of the member." Annie J. Straw at the time of her designation under the name of Annie J. Kasey, was a dependent of the member; she ceased to be so before his death; the benefit should therefore be "paid to the heir of such member." Cynthia A. Kasey is the daughter and only heir of the member. *Gauch v. St. Louis Mutual Life Ins. Co.*, 88 Ill. 251.

She belongs to a class eligible as beneficiaries. There is no reason why the fund should not be paid to her. It is by analogy certainly in accordance with the law of the state that it should be. *Knights of Honor v. Menkhausen*, 209 Ill. 277; *Baldwin v. Begley*, 185 Ill. 180; *Alexander v. Parker*, 144 Ill. 355; *Palmer v. Welch*, 132 Ill. 141.

We think that justice has been done, that probably the intention of the deceased has been carried out, and that at all events there is no error in the decree of which appellant can complain. It is accordingly affirmed.

Affirmed.

Mary Doyle, Appellant, v. John E. Dunne et al., Appellees.

Gen. No. 13,992.

1. LANDLORD AND TENANT—*effect of signature of third party to lease with those of lessor and lessee.* A third party who opposite a seal affixes his signature following those of the lessor and lessee, does not become a party to the lease if not mentioned therein, nor does such third party assume the obligations thereof or become surety with respect thereto, and parol evidence is not admissible to show a collateral undertaking.

2. LANDLORD AND TENANT—*effect of parol reduction of rent.* A parol agreement to reduce rent entered into by a lessor without consideration is a mere *nudum pactum*, not binding, and while the lease remains executory is not susceptible of being enforced, but a reduction accomplished periodically as the rent accrues, by accepting a sum less than the stipulated rent for such period, is valid and constitutes an executed gift.

Doyle v. Dunne, 144 App. 14.

Action of debt. Appeal from the Circuit Court of Cook county; the Hon. GEORGE A. CARPENTER, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed October 8, 1908.

ALEXANDER SULLIVAN and BURTT & KRIETE, for appellant.

LOESCH, SCOFIELD & LOESCH, NEWTON WYETH and H. W. McEWEN, for appellees.

MR. JUSTICE BROWN delivered the opinion of the court.

This appeal is by the plaintiff in an action of debt in the Circuit Court of Cook county, against whom there was a judgment of *nil capiat* and for costs in favor of one of the defendants to the suit, the Independent Brewing Company, and in favor of whom there was a judgment for only \$134.45 against the other defendant, John E. Dunne, although a much larger sum was claimed by the plaintiff against both defendants.

The suit was upon a lease under seal, wherein appellant was lessor and the appellee, John E. Dunne, lessee, and the name of the Independent Brewing Company appears as a signature below the signature of the parties, Mary Doyle and John E. Dunne, who were alone mentioned in the body of the lease as parties thereto.

The lease (which was received in evidence) was of certain real estate, from the first day of May, 1893, until the 30th day of April, 1903, for the aggregate sum of \$9,000, payable in quarterly instalments of \$225 in advance on the first days of May, August, November and February in each year. The lease also provided that the lessee should pay all taxes and assessments that might be laid, charged or assessed on said demised premises pending the existence of the lease, and that if at any time after any tax should have become due or payable the lessee should neglect to pay the same, it should be lawful for the lessor to pay the same at any time thereafter, and the amount of any

and all such payments so made by the lessor should be deemed and taken and were declared to be so much additional rent for the demised premises.

The claim of the appellant was for \$134.45 taxes and special assessments which she proved she paid in August, 1903, after the expiration of the term of the lease, but which were levied and assessed in 1902 and \$715, balance of rent, being a sum of \$15 which it is claimed was in arrears on and after July 13, 1897, and which sum in arrears increased under the terms of the lease by \$40 during the quarter beginning August 1, 1897, and \$30 each quarter thereafter during the continuance of the lease.

This calculation of rent due is made this way: Prior to July, 1897, it became the practice of the appellee Dunne to pay monthly, during the respective months of the quarter, one-third of the quarter's rent, being \$75. After that date for seventy months he paid but \$65 each month, leaving, as appellant claims, \$700 due in addition to the fifteen dollars which was not paid up on July 13, 1897.

This \$15 does not seem accounted for by the evidence either oral or documentary which was offered, but we do not think it material that it should be explained, because the distinct admission was made by the counsel for the plaintiff during the hearing below, that if the position of the appellee Dunne concerning the \$65 monthly payments was correct, that is, if the rent of the seventy months during which Dunne paid \$65 a month, was settled by these payments, there was nothing due the plaintiff but the \$134.75 paid for taxes and assessments, for which she recovered judgment. (Rec. p. 96.)

The evidence showed that in July, 1897, appellee Dunne met the appellant, Mary Doyle, and asked her to reduce his rent from \$75 a month to \$50 a month, to which, after some talk, she replied, "No, I won't make it \$50 a month, but I will make it \$65 a month." Thereafter Dunne paid \$65 during each month while

the lease continued, and gave up the premises to the appellant a few days before its expiration. He received a receipt each time he made a payment, and the receipts were produced in evidence by him. No further conversation concerning rents appears by the record ever to have taken place between the parties, but on February 29, 1904, ten months after the lease had expired and the premises been surrendered, the present suit was begun.

The receipts which were taken by Dunne varied somewhat in form. That of July 30, 1897, which Dunne said was the first one after the reduction was assented to by appellant, was as follows:

“CHICAGO, July 30, 1897.

Received of John E. Dunne July 29,/97, Seventy-five and no/100 Dollars as follows—Cash \$65.00. Allowance for July \$10, for Rent of No. 172 Michigan St. from June 30, 1897, to July 31, 1897.

\$75.00.

MADDEN BROS., Agts.,
Per Armel.”

The next one on September 9, 1897, was substantially in the same form. The third was:

“CHICAGO, Oct. 1, 1897.

Received of John E. Dunne Sixty-five and no/100 dollars for Rent of store No. 172 Michigan St. from Aug. 30, 1897, to September 30, 1897.

\$65.00.

MADDEN BROS. Agts.,
Per E. H. Doherty.”

Receipts dated December 24, 1897, and December 31, 1897, were each expressed to be for “\$75—\$10 allowed,” and one was for rent from October 31, 1897, to November 30, 1897, and the other from November 30, 1897, to December 31, 1897.

Receipts dated February 2, 1898, March 2, 1898, and April 7, 1898, were expressed to be for \$65 each, but a notation of “\$10 allowed” was made on them, and they were stated to be in each case for rent for the preceding month.

The receipt for the payment of \$65 which it is admit-

Doyle v. Dunne, 144 App. 14.

ted was made May 9, 1898, is missing. One dated June 8, 1898, reads:

"CHICAGO, June 8, 1898.

Received of Jno. E. Dunne Sixty-five and no/100 Dollars for acct. Rent of 172 Michigan St. from— 189— to — of May, 1898.
\$65.

MADDEN BROS., Agts.,
Per Armel."

One dated July 15, 1898, is:

"CHICAGO, July 15, 1898.

Received of John E. Dunne Sixty-five (65) Dollars for Rent of 172 Michigan St. from June, 1898, to June 30/98.
\$65.00

MADDEN BROS., Agts.,
Per Steve."

Then follows a series of twelve receipts, each of which is for \$65, and one of which was in each month from August, 1898, to July, 1899. The one given in December, 1898, is expressed to be "from Nov. 1, 189— to on acct. Nov. 30, 1898," and that given in February, 1899, is "from Jan. 1, 189—, to Feb. 1, 189—." The one dated in July, 1899, also mentions the month of June. They all have somewhere in them the expression "for acct. rent," or "to on acct." some date, or simply, "on acct. of rent."

A receipt dated August 4, 1899, has attached to it the following note:

"CHICAGO, Aug. 4, 1899.

MR. DUNNE:—

Mrs. D. wants to go to the country to-morrow and needs the July rent money. Will you please send ck. by bearer and very much oblige us.

Yours, etc.,

MADDEN BROS.;"

and reads as follows:

"CHICAGO, Aug. 4, 1899.

Received of Jno. E. Dunne Sixty-five and no/100 Dollars for Rent of 172 Michigan St. Store on account of Rent.
\$65.00.

MADDEN BROS., Agents,
Per M."

Receipts were then produced given in September, 1899, and in each subsequent month up to and including July, 1902, except in October, 1901, and April, 1902, each for \$65, all containing some such expression as "on acct." or "to on acct." The receipts for admitted payments of \$65 on October 10, 1901, and on April 9, 1902, are missing. The next receipt is:

"CHICAGO, Aug. 9, 1902.

Received of J. E. Dunne Sixty-five Dollars for Rent of 172 Michigan St. From July 1, 190 to July 31, 190 .
\$65.00

MADDEN BROS., Agents,
Per M. S. M."

There follow this a receipt given in September, 1902, for "Sixty-five & no/100 dollars for Rent of 172 Michigan St. from Aug. 1st to August 31st," and similar receipts in October, November, December, 1902, and January, February, March, April and May, 1903, for the rent in each case of the preceding month, none of them containing any expression concerning "acct. of" or "on acct.," except those given March 7th and May 2, 1903, which say "for month ending Feby. on acct. 190—," and "for month ending on acct. for April rent 1903," respectively.

We think that these receipts taken together clearly show that \$65 a month was paid by Dunne and received by Mary Doyle's agents (it is conceded that Madden Bros. were her authorized agents) for July, 1897, and for each month thereafter separately during the continuance of the lease up to and including April, 1903. We attribute no importance to the expression "on acct.," "for acct. of," etc., in the receipts. The expression very commonly means "on the score of," or merely "for," and sometimes means nothing. The evident fact, shown by this long series of payments of \$65 monthly following the conversation which the record shows concerning a reduction of rent, and uninterrupted or followed by any complaint or demand for more money until, almost a year after the lease had

expired, this suit was brought, is that these payments were respectively made and accepted as the full rent for the months respectively preceding them.

The note to Dunne of August 4, 1899, although no stronger than all the other indications, would be sufficient in itself to show the situation.

Under the theory that the \$65 payments had only been accepted on account, after the formal statement in the receipts of \$10 allowance had ceased—which seems now to be the appellant's claim—there would have been most of the May rent and all of the June rent in arrears and due, as well as the July rent. But the appellant, by her agents, asks for the "July rent" because she is to leave town.

The plaintiff introduced evidence that before the lease was signed Dunne had talked with the Independent Brewing Association officers with reference to it, and afterward, during the term of the lease, bought the beer for a saloon situated in the premises, from the association. Dunne said the secretary of the association was a friend of his, and agreed to go on the lease if he would buy the association's beer, and did go on it. Mr. Madden, the appellant's agent, testified that he talked with the president of the association and told him that Mr. Dunne wanted to lease the premises and the owner wanted security, and had been referred by Dunne to the Independent Brewing Association. The president said that Mr. Dunne had spoken to him and they were willing to go on the lease to secure it. After the lease was drawn, after Mr. Dunne signed it and before Mrs. Doyle signed it, the Independent Brewing Association signature under Mary Doyle's and John E. Dunne's was made as follows:

"INDEPENDENT BREWING ASSOCIATION,
F. C. LANG, Pres.
J. HENRY ZILT, Secy."

All this testimony was introduced subject to objection as improper against the Brewing Association, and

the lease itself was objected to on the ground that the name of the association does not in any manner appear in it nor is mentioned by it except as it is signed at the bottom.

This being the state of the record, it was claimed by the plaintiff in the court below, and is claimed here by her as appellant under her assignments of error, that the Independent Brewing Association is a guarantor or surety on the lease; that the judgment should have been against both defendants for the balance for rent claimed to be due in addition to the sum of \$134.45 paid by appellant for taxes; that the provisions of the lease as to the amount of rent accruing are still in force; that the agreement for reduction relied on by the appellees was without consideration—a *nudum pactum*—and in violation of the Statute of Frauds; that the provisions of the lease could not be modified by parol, and that the liquidated and undisputed sum due appellant by the terms of the lease could not be satisfied by the payment of a less sum; that therefore this suit was sustainable for the difference between the amount reserved by the lease and the amount paid, and that the Independent Brewing Association, as well as Dunne, was liable for the same, and that the Association as surety on the lease had not been released.

We do not think that as applied to this case these contentions can be sustained.

The Independent Brewing Association is sued in an action of *debt* as having undertaken by deed to pay certain money. It has neither signed nor sealed any covenant, contract or deed to do so. It has placed its name under the signatures of the parties to a contract which explicitly and expressly refers to those particular parties and to those particular parties or to one of them, only, in every one of its clauses. It, however, is not pretended that by so placing its name it became either first or second party to the lease—either lessor or lessee. Such a pretention would be absurd and is not made. For aught that appears on the face of the

instrument, its signature might be that of a witness. But the contention of the plaintiff amounts to this: That a sealed signature to an instrument may be supplemented by parol testimony to show that the signature constituted a deed of covenant entirely different from but collateral to the instrument signed, the terms of which deed can be supplied by the parol testimony.

This is not a case in which the signer is really a party to the deed signed, his name being omitted by mistake; nor a case of ambiguity in the meaning of terms; nor a question of the obligations under the law merchant of a party to a negotiable instrument; and we think the language of the Supreme Court in *Lancaster v. Roberts*, 144 Ill. 213, is applicable:

“It would seem * * * upon reason and principle that where a third person merely annexed his name to a contract which in the body of it does not mention him, and which is in itself a complete contract between other parties who sign it and are mentioned in it, such third person does not thereby become a party to the efficient and operative parts of the contract. His signature in such case can only be regarded as an expression of his assent to the act of the parties in making the contract, and may perhaps operate as an estoppel against his assertion in the future of an adverse interest in the subject-matter of the agreement.”

We think, as against the Independent Brewing Association in this action, both the lease and the testimony introduced to explain the signature of the Association to it, were incompetent, and in any event, furnished no ground for holding the Association liable for any part of the claim sued for. Therefore, the judgment, so far as the Independent Brewing Association is concerned, is correct and should be affirmed. But in our view of the matter, this is important only as relieving this defendant from the liability found by the court below to rest on John E. Dunne to repay Mrs. Doyle the amount of the taxes and assessments levied in 1902,

but paid by her in 1903. For we think, as did the court below, that this is all for which Dunne is liable.

We do not think it necessary to discuss the question whether, had the Independent Brewing Association been originally liable in an action of debt as surety on the lease, the subsequent action of the parties to it would have released it, for the conditional hypothesis seems to us plainly against the fact.

That Dunne is liable in this action for the difference between the amount he has paid and the amount reserved by the lease, is deduced by the plaintiff's counsel from the doctrine of such cases as *Loach v. Farnum*, 90 Ill. 368, and *Goldsbrough v. Gable*, 140 Ill. 269, which hold that a parol agreement to reduce rent, entered into by a lessor without consideration, is a mere *nudum pactum*, not binding, and not susceptible of being enforced; from such cases as *Chapman v. McGrew*, 20 Ill. 101; *Alschuler v. Schiff*, 164 Ill. 298, and *Ryan v. Cooke*, 172 Ill. 302, which hold that an instrument under seal cannot be modified by parol, and from those cases which hold that the payment of a less sum where a greater liquidated and undisputed sum is due, is not a satisfaction of the greater sum.

But as the Supreme Court noted in *Snow v. Griesheimer*, 220 Ill. 106, the rules of law thus laid down, even in executory contracts, defeat the intention of the parties and should not be unduly extended.

And in the cases cited on leases the doctrine is simply that so long as the contract contained in the lease under seal remained executory, the plaintiff had a right to repudiate the parol agreement and claim the full amount of rent contracted for, while in the *Snow* case the converse is explicitly recognized, that "If the parties have executed the contract as modified, so that nothing remains to be done by either party, it is no longer executory and the contract as executed will not be disturbed." The court in *Snow v. Griesheimer* follows the words just quoted with a statement which, if

we substitute "1903" for "1898," exactly conforms to our view of the situation here:

"The lease expired April 30, 1898, before suit was brought, and the evidence tended to show that it had been fully performed on both sides. The fact that it had been so performed could be shown in defense of the suit."

Counsel for plaintiff seek to distinguish *Snow v. Griesheimer* from the case at bar, on the ground that the testimony in *Snow v. Greisheimer* tended to show a consideration for the reduction of rent, while in the present case no such consideration was even claimed. But the whole tenor of the opinion in *Snow v. Greisheimer* shows that this was not the test applied. It was the difference between an executed and executory contract which was insisted on. And the opinion in *Goldsbrough v. Gable* (*supra*) suggests the difference between that case and the present one, and the ground on which the finality of the settlement of rent charges between the parties in the case at bar should be sustained, when it says: "Nor can it be held that the agreement has the effect of an executed gift as to the difference between the \$50 and the \$70 per month, *because there was executed no receipt or release for the amount, and there was no proof of any action equivalent thereto.*"

In *Goldsbrough v. Gable* it would appear that the amounts paid were paid at random on account, the difference between the parties being that the defendant claimed that they were paid on account of the reduced amount which he said had been agreed on; the plaintiff that they were paid on account of the original amount reserved by the lease. The question thus was, whether the executory agreement could be supported as a gift—not, as in this case, whether the settlements made, as we have indicated the evidence clearly shows, we think, they were made each month for the rent of the preceding month, involved each month an executed valid gift of the ten dollars "deficit," if so it may be

called. Such a gift was clearly expressed in each of the receipts dated respectively July 30th, September 9th, November 1st, December 24th, December 31st, 1897, February 2nd, March 2nd, and April 7th, 1898, and we cannot doubt, from the whole course of the dealings, was clearly involved and implied in the intervening one of October 1st, 1897, and all those subsequent to April 1, 1898. It is the actual executed waiver and release of the difference in the rents, not the "agreement" made without consideration, which was thus sustained as a gift by the trial judge when he declined in a suit begun almost a year after the contract of lease had terminated and expired by its terms, and the accordant surrender of the premises, to hold the lessee liable for money from the payment of which the evident intention and understanding of the parties—as understood by both of them—was that he should be and had been released.

We think the decision was correct, and the judgment of the Circuit Court is affirmed.

Affirmed.

Patrick Kennedy, Appellant, v. City of Chicago, Appellee.

Gen. No. 14,003.

1. *INSTRUCTIONS—upon doctrine of assumed risk approved.* An instruction with respect to the doctrine of assumed risk as follows, approved:

"The jury are instructed that the plaintiff in becoming an employe of the defendant as a laborer assumed the ordinary risks, hazards and dangers incident to the work in which he was engaged, and if you believe from the evidence that the plaintiff was injured by reason of the caving in of the earth in a ditch in which he was working, and that the risks, hazard or danger of such caving in was an ordinary one, incident to the work, then plaintiff cannot recover, and the jury must find the defendant * * * not guilty."

2. *INSTRUCTIONS—upon duty to decide case according to evidence and instructions of court approved.* An instruction upon this subject as follows, held subject to some criticism but not a reason for reversal.

Kennedy v. City of Chicago, 144 App. 25.

"The court instructs the jury that in considering this case, it is not only your duty to decide the case according to the weight of the evidence, but it is also your duty to decide it according to the law as given you by the court, applied to the evidence. While it is true that the attorneys for the respective parties may state to you what they believe the law to be and base arguments thereon, still under your oaths and under the law you have no right to consider anything as law except the court gives you an instruction in writing to that effect, or in other words, you should consider only that as law which is given you by the court in his written instructions, and decide the case accordingly."

Trespass on the case. Appeal from the Superior Court of Cook county; the Hon. AXEL CHYTRAUS, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed October 8, 1908.

RICHOLSON & LEVY, for appellant; C. STUART BEATTIE, of counsel.

EDWARD J. BRUNDAGE and JOHN R. CAVERLY, for appellee; EDWARD C. FITCH, of counsel.

MR. JUSTICE BROWN delivered the opinion of the court.

This is an appeal from a judgment of *nil capiat* and for costs against the appellant, who was plaintiff below, and in favor of the city of Chicago, who was the defendant below.

The action was for personal injuries suffered by the plaintiff while working as a laborer for the city in a ditch on Elburn avenue between Ashland avenue and Lafin street in said city. He was engaged with other laborers in digging a trench five or six feet deep, in which to lay a water-main pipe, and also in finding taps in an old and smaller main laid four or five feet below the new one, so that the house connections would be made with the new pipe.

The plaintiff, under orders, was digging and looking for a tap in this trench, when a portion of its north bank caved in from the top. The plaintiff was covered by the clay to some point on his body, concerning which the witnesses differ. The plaintiff, who was confirmed by another witness, says he was covered up to his head. Several of his ribs were broken, and he was at

the hospital two weeks and confined to his bed a longer time, and claims to have been permanently injured.

The plaintiff's claim against the city was based on the proposition that the plaintiff was ordered to work in the trench at a point where it was unsafe and not properly protected against the cave or slide which occurred. The defense, outside of the question as to the extent of the injuries, was based upon the proposition that the conditions showed no negligence in setting the plaintiff to work at this point without shoring or bracing in the trench, and that whatever risk of an accident like this existed was assumed by the plaintiff, who had been doing ditch work and making tap connections for the city for six or seven years, and had worked for it altogether seventeen or eighteen years. He had been working in this particular excavation for about two weeks, and within thirty feet of the place of the accident on the last working day before. He was familiar, therefore, with the soil through which the excavation ran.

It is unnecessary to discuss the evidence on these questions involved, for they were plainly for the jury and they were left to the jury. A peremptory instruction for the defendant was denied. It is sufficient to say that a consideration of the evidence does not show that we should be justified, on the ground that it was against the manifest weight of the evidence, in disturbing the verdict rendered by the jury for the defendant.

The only question that remains, therefore, is whether the instructions contained reversible error. We do not think they did.

The plaintiff tendered two only, which were both given. The defendant tendered nine, which were all given. Three of them are complained of by the plaintiff. The first of these three is the following:

"The jury are instructed that the plaintiff in becoming an employe of the defendant as a laborer as-

sumed the ordinary risks, hazards and dangers incident to the work in which he was engaged, and if you believe from the evidence that the plaintiff was injured by reason of the caving in of the earth in a ditch in which he was working, and that the risks, hazard or danger of such caving in was an ordinary one, incident to the work, then plaintiff cannot recover, and the jury must find the defendant, the city of Chicago, not guilty."

The appellant says: "This was all the law given in any instruction as to the duty of the master or the reciprocal duty of the servant during the employment, and of course does not touch our theory of *special hazard*, so fully declared in the Haenni case."

The doctrine referred to in the Haenni case, 146 Ill. 626, is thus quoted from that case by the appellant's counsel:

"As to the master's duty to give notice, the law is that if there are latent defects or hazards, incident to an occupation, of which the master knows or ought to know, and which the servant from ignorance or inexperience is not capable of understanding and appreciating, it is the duty of the master to warn or inform the servant of them."

We do not think there is anything in the instruction inconsistent with the doctrine of the Haenni case. It speaks of "ordinary hazards," not latent or special ones, and compels the jury to find the hazard of "caving in," "an ordinary one, incident to the work," before they could find the defendant not guilty under it.

Neither in the declaration nor in any instruction offered by the plaintiff was there any indication of a theory that the danger of caving in was one which "the master knew or ought to have known," and which "the servant from ignorance or inexperience was not capable of understanding and appreciating."

Nor in our opinion did the evidence tend to support any such theory. If the plaintiff relied on it and wanted an instruction on assumption of risk supple-

menting the one given, which certainly stated the law correctly as far as it went, he should have asked for it.

The second instruction complained of is this:

“The court instructs the jury that in considering this case, it is not only your duty to decide the case according to the weight of the evidence, but it is also your duty to decide it according to the law as given you by the court, applied to the evidence. While it is true that the attorneys for the respective parties may state to you what they believe the law to be and base arguments thereon, still under your oaths and under the law you have no right to consider anything as law except the court gives you an instruction in writing to that effect, or in other words, you should consider only that as law which is given you by the court in his written instructions, and decide the case accordingly.”

We think the last clause in this instruction is unfortunately worded, but we do not think it misled or could have misled the jury as applied to this case at all. It meant to them undoubtedly what the first half of the instruction correctly expressed—that it is to the court and not to the lawyers that they were to look for the law; that they were not, as they would have been in a criminal case, judges of the law as well as of the facts; that they were bound to consider that to be the law which the court told them was the law, and were not bound to believe that to be the law which the counsel in their arguments might assert to be the law. So understood the instruction stated entirely correct principles, and it cannot be presumed that it was understood otherwise, or that the jury believed that the whole field of the law had been covered by the court in his instructions, and that they were not at liberty to ask even for further enlightenment on any subject.

We do not think that the instruction concerning the due care required by the plaintiff was erroneous or so inapplicable as to mislead the jury or prejudice the plaintiff.

The judgment of the Superior Court is affirmed.

Affirmed.

International Salt Co. v. Tennant, 144 App. 30.

International Salt Company, Appellee, v. Robert G. Tennant, Appellant.

Gen. No. 14,019.

1. **INSURANCE**—*what does not operate as an ipso facto cancellation of a Lloyd's policy.* Held, that the Lloyd's policy involved in this suit, the going into effect of which was dependent upon the existence of another policy of insurance, did not *ipso facto* terminate upon the cancellation of such collateral policy.

2. **CONTRACTS**—*when custom binding; when not.* A custom to bind a party to a contract must be known to the party sought to be bound or be so universally established as to be presumed to be within the knowledge of such party.

3. **INSURANCE**—*when proof of notice waived.* Proof of notice of a fire within the time allowed by the policy, held waived by the placing of the defense on another ground in the court below.

Action commenced before justice of the peace. Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed October 8, 1908.

WILLIAM E. CLOYES, for appellant.

ROBERT S. ILES and **ROBERT D. MARTIN**, for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

The judgment appealed from in this case was for \$144.06, and was rendered by the Circuit Court sitting without a jury and trying *de novo* an appeal from a justice of the peace in Cook county. Before the justice the plaintiff, the International Salt Company, had recovered a judgment against the defendant, Robert G. Tennant, for \$125.28, and the judgment in the Circuit Court was for the same amount with interest added for the interval between the trials. It is assigned here as error that the judgment was against the law and the evidence, and that the court received improper evidence and excluded proper evidence at the hearing.

The suit was upon a so-called "Lloyd's" insurance policy, which was produced in evidence, in and by which the defendant, Robert G. Tennant, with nine other persons, under the name of "Tennant's Fire Underwriters," in consideration of a premium of \$46.50, bound themselves to pay to the said International Salt Company of Illinois, all loss or damage by fire between November 17, 1902, and November 17, 1903, on merchandise belonging to or in possession of said company in South Chicago, to the amount of \$2,500, within sixty days after such loss was proved. But the liability of any one of the ten underwriters was not to exceed his proportionate part of the entire liability resting on the ten; that is, each underwriter insured for \$250; nor in case of partial loss was the liability of any underwriter to exceed a sum which should bear the same proportion to the amount of loss recoverable under the policy as the amount of such underwriter's subscription should bear to \$2,500.

The following provisions are in the policy:

"This policy is issued on the representation and with the warranty by the assured that the Phoenix Insurance Company of New York have a policy or policies in force on the identical property described herein during the existence of this policy to the amount of at least \$50,000, in form concurrent herewith on the identical subject-matter, and in identically the same proportion on each separate part thereof.

"It is hereby further warranted and is a condition on which this insurance is based, that this policy is subject to all the clauses, conditions, rates and proportions, and will follow identically the same adjustment and settlement of any loss that may be sustained under this policy, as that made on policy or policies above issued by the Phoenix Insurance Company of New York.

"This policy can be canceled at any time at request of insured by surrender of policy to Robert G. Tennant, attorney, said Robert G. Tennant retaining for the underwriters the customary short rate, or policy

may be canceled by the said Robert G. Tennant, attorney, or either of the underwriters hereto by giving five days' notice of such cancelation to the insured, and surrendering to the insured the unearned portion of the premium actually paid to said Robert G. Tennant. This policy is made and accepted, subject to the foregoing stipulations and conditions, together with such other provisions or agreements or conditions as may be endorsed hereon or added hereto, and no one shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions, no one shall have power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured, unless so written or attached."

There was a policy covering the same property issued by the Phoenix Insurance Company on May 15, 1902, and running from the 24th day of May, 1902, to May 24, 1903, in existence at the time that the Tennant policy was issued on November 18, 1902, and the Tennant Underwriters made no separate investigation of the risk, but issued their policy, as was their custom, on the faith of the previous issue of the Phoenix policy. The Phoenix policy contained, however, the usual provision that it might be canceled at any time by the company on giving five days notice of such cancelation, and on April 20, 1903, the Phoenix Company gave notice of cancelation to the firm of Moore, James, Lyman & Herrick, who were the insurance agents who placed the order of the International Salt Co. for insurance both with the Phoenix Company and the Tennant Underwriters. Mr. Moore of that firm testified:

"We as insurance agents representing a number of insurance companies, receive orders from people desiring insurance. We undertake to fill their orders

for insurance—that is, as far as we are agents for them.”

The custom, he said, was to send cancellation notices to the agents who placed the insurance.

Moore, James, Lyman & Herrick received the cancellation notice of the Phoenix policy, which was given as of April 20, 1903, and purported to effect the cancellation of the policy on April 25th. The International Salt Company, unless the knowledge of Moore, James, Lyman & Herrick was its knowledge, did not know of the cancellation of the Phoenix policy on April 28th. On that day a fire occurred which damaged to the extent of \$71,534.82 the insured property, which was covered by policies (excluding the Phoenix policy) aggregating \$142,750.

Mr. Moore testified: “We, as a matter of fact, knew that the cancellation notice” (of the Phoenix Company) “had been served on the 20th. We had no authority to act for the International Salt Company in receiving that notice of cancellation, but in this case we told them we had accepted notice that the policy was canceled on the 25th, three days before the fire; consequently they gave up the policy at my request the morning after the fire.”

Proofs of loss, conceded to be in due form and adequate, and to be for the proper amount if the Tennant’s policy was in force and the Phoenix policy was not, were under date of May 26, 1903, presented by Moore, James, Lyman & Herrick to the “Tennant’s Fire Underwriters” through Mr. Tennant, who was their “attorney in fact” for this insurance business. They were returned by Mr. Tennant and payment refused on the ground that the Phoenix Company must sign them to show that it had adjusted the loss and paid their *pro rata* proportion of it, before the Tennant Underwriters would be liable for it. The amount claimed by the proofs of loss from the Tennant Underwriters was \$1,252.80, for one-tenth of which each un-

derwriter was liable if the amount of the claim was due on the policy. On account of the refusal to pay, suit was brought against the defendant Tennant for \$125.80 on September 14, 1903, before Justice Underwood, with the subsequent results before noted.

The defendant has argued in this court that as there was a provision in the Phoenix Insurance Company policy which must be considered as read into the Tennant policy, that "if fire occur, the insured shall give immediate notice of any loss thereby in writing to this company," and as no evidence was offered by the plaintiff showing any such notice prior to the execution of the proofs of loss twenty-eight days after the fire, the plaintiff cannot recover on the policy.

There is no merit in this contention. If we were willing to hold—which we are not—that failure to notify the insurer of a fire within twenty-eight days necessarily worked a forfeiture, it would be a matter of defense. There is no evidence here that the insurer was not notified "immediately;" the evidence which defendant must refer to in his argument from which he draws this inference is only that of Mr. Tennant that no "*proofs of loss*" except that marked plaintiff's exhibit 2 was ever tendered him—a very different thing.

For the proofs of loss sixty days were allowed; they were given in perfectly regular form within thirty. If proof of notice within some shorter time were otherwise necessary, the plaintiff was certainly excused from making it by the explicit placing of the defense, by the defendant himself and his counsel at the trial below, entirely on the absence of the Phoenix Insurance Company from the list of insurers in the proofs of loss, and on the demand that before settlement an adjustment should have been made by the Phoenix Company.

Giving the widest interpretation to this claim, it included only these two points: First, that the Tennant policy requiring an adjustment by the Phoenix

Company made, in the language of the defendant's argument, "the Phoenix Company an arbitrator or umpire between the appellee and the appellant and his associates;" and, second, that the cancelation of the Phoenix policy *ipso facto* canceled the Tennant policy. We do not think either position tenable.

The Tennant policy did read into itself the "clauses and conditions" of the Phoenix policy, and that policy provided a method of appraisement and adjustment in the event of a disagreement "as to the amount of the loss," "the insured and *this* company each selecting an appraiser," etc. Reading this into the Tennant policy, however, does not involve making the Phoenix Company an umpire. There was no disagreement "as to the amount of loss" shown, and if there were, the clause in the Tennant Policy would require the selection of an appraiser by the Tennant Underwriters, not by the Phoenix Company.

But there is a clause in the Tennant policy which provides that "this policy * * * will follow identically the same adjustment and settlement of any loss that may be sustained under this policy as that made on policy or policies above issued by the Phoenix Insurance Company;" and it is insisted that this made an adjustment by the Phoenix Company an indispensable condition of liability under the Tennant policy, and that therefore "upon the cancelation by the Phoenix Insurance Company of its policy it became impossible for the contract between appellant and appellee to be carried out according to its terms, and it therefore ceased." This is equivalent to saying that the existence of the Tennant policy was dependent on the synchronous coincident existence of a Phoenix policy, and that when the Phoenix policy ceased by its expiration or cancelation, the Tennant policy necessarily did the same. This is in fact the chief defense made in this case, and, as we view it, the only significant one. It is based not only on the clause we have last quoted, but also on the provision of the

policy that it "is issued on the representation and with the warranty by the assured that the Phoenix Insurance Company of New York have a policy or policies in force on the identical property described herein during the existence of this policy to the amount of at least \$5,000, in form concurrent herewith, on the identical subject-matter, and in identically the same proportion on each separate part thereof."

The plaintiff's claim rests on the proposition that this only requires that at the time the Tennant policy was issued, and for an appreciable time thereafter ("during," that is, in the sense of "in the time of") a Phoenix policy should be in existence; the defendant's answer is based on a different interpretation of "during," which would make it mean "throughout the whole time of."

In consideration of the undoubted rule that the terms of an insurance policy must be construed most strongly in favor of the insured, and of the facts that a sufficient reason for the existence of the provision appears, if it is construed only as involving a substitute for a separate investigation of the risk by the insurers, who signify it by their willingness to rely on the investigation that must have been made by the Phoenix Company; that it would have been very easy, had that intention been present, by explicit words to have made the cancelation of the Phoenix policy terminate the Tennant policy; that the Phoenix policy, on which the Tennant policy was based (as might by inquiry have been learned by Mr. Tennant if he did not otherwise know it) expired by its own terms through lapse of time on May 24, 1903, while the Tennant policy ran to November 17, 1903, and was paid for until that time, and that the Tennant Underwriters expressly retained the power formally to cancel on five days notice their own policy (which they might have used, but did not use, when the Phoenix canceled its policy), we must hold that the plaintiff's and not the defendant's construction of the clause in

question is correct, and that the cancelation of the Phoenix policy did not *ipso facto* terminate the Tennant policy.

Nor do we think that the court erred in rejecting the offer of defendant's counsel to prove by his client "that there is a well known usage and custom in the insurance world, under which * * * the cancelation of the original insurance policy, the warranty policy * * * —in this case the Phoenix policy—operated as a cancelation and termination of this contract of insurance on which this suit was brought, and that that is a well known usage and custom in this state."

This falls short of offering to prove a custom or usage known to the insured, or so universal and established as to be presumed to be within its knowledge, which state of things alone, if the custom were otherwise competent, would make it binding on the plaintiff, or read it into the contract between it and the defendant.

But in any event, while custom may explain a contract, it cannot make or break a contract, and we think that here the construction of the policy must be determined from the face of the instrument.

There is raised by the plaintiff a question whether the Phoenix policy was itself validly canceled before the fire. We have assumed that it was, since the plaintiff evidently ratified the action of the insurance agents in accepting service of the necessary notice. We are not deciding, however, that such service on the agents was in itself sufficient; we have had occasion to hold the other way in other cases and under other circumstances.

The position of the defendant that the insurance agents, Moore, James, Lyman & Herrick, bound the plaintiff by receiving and retaining a payment for unearned premiums on the Tennant policy from April 20, 1903, to its stipulated termination in November, and that thereby the claim for loss was waived, is

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manifestly untenable. Mr. Moore's testimony shows the situation and is apparently confirmed by an inspection of the receipt—defendant's exhibit 1 in the record. According to a running account between Moore, James, Lyman & Herrick and the Tennant Underwriters, the former, long after the fire, sent a bill for unearned premiums on cancelled policies to the latter. It did *not* include an item for this policy. On receipt of the bill Mr. Tennant, or some one for him representing the Underwriters, added an item for the International Salt Company policy and two other items (the three items are in a different handwriting and in different ink), and sent a check for the aggregate amount. Moore, James, Lyman & Herrick, who had no authority to consent to any cancelation of the policy or accept return premiums or waive the claim on the policy, crossed out the "International Salt Co." item of \$26.90, and tendered that amount back to Tennant, who refused, for the Underwriters, to accept it. There was nothing in this affecting the plaintiff's rights.

The judgment of the Circuit Court is affirmed.

Affirmed.

Laura S. Wilkinson, Executrix, Appellee, v. Aetna Life Insurance Company, Appellant.

Gen. No. 14,046.

1. **INSURANCE**—*how proof of death from accidental means may be shown.* Direct evidence is not essential to establish the fact of death from accidental means; circumstantial evidence is sufficient and is frequently more convincing than direct.

2. **INSURANCE**—*what establishes prima facie showing of accidental means.* External and violent means having been proven, the presumption against self-inflicted injuries and against murder, without further evidence, involves a *prima facie* showing of "accidental means."

3. **INSURANCE**—*what not essential to establish liability upon*

claim of death resulting from accidental means. In order to fasten liability under an accident policy, it is not essential that the jury shall determine or find in what precise manner the fire which caused the death of the insured began or how it proceeded or in what manner the deceased received each of the burns which together resulted in his death.

4. *INSURANCE—how ambiguities in policies are resolved.* Ambiguities contained in policies of insurance are to be resolved in favor of the insured "so as not to defeat his claim to the indemnity which in making the insurance it was his object to secure."

5. *EVIDENCE—when presumptions entitled to probative force.* The presumption which prevails that until the contrary is established it will be assumed that injuries were not self-inflicted, is entitled to probative force and may be made the basis of instructions by the court and of consideration by the jury.

6. *INSTRUCTIONS—what errors cannot be complained of.* A party cannot complain of an error committed at his own instance.

7. *INSTRUCTIONS—when reference to evidence objectionable.* Instructions which single out and call attention to specific features of evidence are properly refused.

8. *INSTRUCTIONS—when as to consideration of evidence calculated to mislead.* The following instruction:

"The jury are instructed that in order to recover in this case it is necessary for the plaintiff to prove by a preponderance of the evidence, or it must appear from the evidence, that the death of the insured was the result of accidental means, otherwise plaintiff cannot recover. The jury have no right to indulge in conjectures or speculations not supported by the evidence; and in determining whether the injuries to the deceased were or were not effected through accidental means, the jury must confine themselves to the evidence and such inferences as they believe may be rightfully and reasonably inferred from the evidence given in the case. The jury have no right to assume the existence of any fact not shown by the evidence to exist, and if they cannot find for the plaintiff without assuming the existence of such fact or facts not so shown to exist, their verdict must be for the defendant,"—

held, calculated to mislead the jury into a confusion between mere conjectures and speculations on the one hand and legitimate inferences from facts in proof on the other; in other words, between mere assumptions and circumstantial evidence.

9. *INSTRUCTIONS—must not assume existence of facts in dispute.* An instruction is properly refused which assumes the existence of facts in dispute.

Assumpsit. Appeal from the Superior Court of Cook county; the Hon. BEN M. SMITH, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed October 8, 1908.

Statement by the Court. This is an appeal from a judgment of the Superior Court on May 4, 1907, in

favor of the appellee, who was plaintiff below, against the appellant, who was defendant below. The judgment was for \$28,151.30, which sum was the amount with interest to its date of a verdict of a jury in favor of the plaintiff for \$27,982.64 rendered March 21, 1907, in said Superior Court.

The verdict was rendered in a suit in *assumpsit* brought by the plaintiff as executrix of the last will and testament of John Wilkinson, deceased, against the defendant, the Aetna Life Insurance Company, on two policies of insurance issued by said company.

The declaration was in eleven counts. The first six were on a policy which the company termed a "Twentieth Century Combination Accident Policy," and numbered 729605.

This policy, which was properly described in the declaration and attached to the same, and was afterwards produced in evidence, is, in its provisions affecting this case, to the following purport:

In consideration of twenty-five dollars premium the company insures John Wilkinson, of Chicago, under classification of "Select," being "a Secretary—Office and Traveling duties" by occupation, for six months from January 9, 1901, from bodily injuries effected through external, violent and accidental means. After providing for a fixed weekly indemnity in case of complete disability and a proportionate part in case of partial disability, the policy proceeds in separate paragraphs alphabetically denominated to provide that various proportionate parts of a "principal sum" shall be paid in place of a weekly indemnity, in the respective cases of different bodily injuries named.

Clauses e. and f. are as follows:

"e. If DEATH results solely from such injuries within ninety days, the said Company will pay the PRINCIPAL SUM of TEN THOUSAND Dollars to the executors, administrators or assigns of the Insured.

"f. If injuries are sustained by means as aforesaid (1) while the Insured is riding as a passenger in or

on any public passenger conveyance, using steam, compressed air, gasoline, cable or electricity as a motive power, or (2) while riding in a regular passenger elevator, or (3) while riding a bicycle (not in a race for prize or purse, concerning which risk see condition two), or (4) *in consequence of the burning of a building in which the Insured shall be at the commencement of the fire*, the amount to be paid shall be double the sum specified in the clause under which claim is made, subject to all the conditions of this policy."

The policy then sets forth thirteen conditions on which it is issued and accepted; those which are of significance in this litigation, beyond the provisions about notice, proof of loss, filing of claim and bringing suit (which provisions it is conceded by defendant were all complied with by plaintiff) being only these:

"2. If the Insured is injured in any occupation or exposure classed by this Company higher than the premium paid for this policy covers, the principal sum insured and weekly indemnity shall be only such amounts as said premium will purchase at the rate fixed for such increased hazard. If accidentally injured while riding a bicycle in a race for prize or purse, the amounts payable will be one-third of the double benefits provided by clause 'f' hereof.

5. In event of death, loss of limb or sight or disability due to injuries intentionally inflicted upon the Insured by any other person (except assaults committed for the sole purpose of burglary or robbery), whether such person be sane or insane, or under the influence of intoxicants or not; or due to injuries received while fighting or in a riot; *or due to injuries intentionally inflicted upon the Insured by himself; or due to suicide, sane or insane*, or due to the taking of poison, voluntarily or involuntarily, or the inhaling of any gas or vapor; or due to injuries received while under the influence of intoxicants or narcotics, then, in all such cases referred to in this paragraph, the limit of this company's liability shall be one-tenth the amount otherwise payable under this policy, anything to the contrary in this policy notwithstanding.

7. No claim against this Company under accident policies shall be valid in excess of ten thousand dollars (or twenty thousand dollars under clause 'f' above)," etc.

This policy, as the declaration alleged and as was admitted on the trial, was kept in force by renewals and was renewed on July 9, 1904, for a term of six months from that date by the payment of twenty-five dollars by John Wilkinson and the issuance to him by the company of a contract or renewal receipt which continued the policy in force to January 9, 1905.

The counts of the declaration on this policy in different forms averred that on September 7, 1904, while said policy was in force, John Wilkinson suffered injuries effected through external, violent and accidental means and in consequence of the burning of a building in which the said John Wilkinson was at the commencement of the fire, from the result of which injuries the said John Wilkinson died within ninety days thereafter, on September 9, 1904, and that thereby the defendant company became liable to pay to the plaintiff as executrix the sum of twenty thousand dollars.

The remaining counts of the declaration, except the last, which is made up of the consolidated common money counts in *indebitatus assumpsit*, are on another policy of insurance issued by the defendant company to John Wilkinson and denominated by the company "Regular Form Accident Policy," and numbered 176163, by which, in consideration of the premium payment of five dollars, the Aetna Life Insurance Company insures John Wilkinson from bodily injuries effected through external, violent and accidental means. This policy, which was also properly described in and attached to the declaration and afterwards produced in evidence, ran originally for three months from December 17, 1900. It had been continued in force and renewed for the last time on June 17, 1904, for three months from that date. This policy contains analogous although not identical provisions

with policy number 729605, concerning indemnity for disability through injury and the payment of a principal sum or a portion thereof in the case of certain specified injuries, and the following clause under which the claim on this policy is made in this suit:

“c. If death results solely from such injuries within ninety days, the said Company will pay the principal sum of five thousand dollars to the executors, administrators or assigns of the insured.”

The conditions in the said policy affecting the claim are:

“2. The maximum liability of the Company hereunder in any policy year shall not exceed the principal sum thereby insured,” etc.; and

“3. This insurance does not cover disappearance; *nor suicide, sane or insane; nor the result of injuries, fatal or otherwise, inflicted intentionally by the insured*, or intentionally by any other person (except assaults committed for the sole purpose of burglary or robbery), nor the result, fatal or otherwise, of injuries of which there is no visible mark upon the body (the body itself in case of death not being taken as such mark), nor the result,” etc., etc.

Suitable allegations in the counts on this policy were made, that while it was in force on September 7, 1904, John Wilkinson suffered injuries through external, violent and accidental means, from the result of which injuries solely he thereafter died on the ninth day of September, 1904, whereby the defendant company became liable to pay to the plaintiff on this policy five thousand dollars.

The claim upon the two policies was thus twenty-five thousand dollars.

To this declaration the defendant pleaded five pleas:

First. The general issue of *non-assumpsit*.

Second. That the plaintiff should not recover over \$667 under the first six nor the last count of the declaration (relating to policy No. 729605), because the in-

juries from which John Wilkinson died were intentionally inflicted on himself.

Third. That the plaintiff should not recover anything under the 7th, 8th, 9th, 10th nor last counts of the declaration (relating to policy 176173), because the injuries from which John Wilkinson died were intentionally inflicted on himself.

Fourth. That the plaintiff should not recover over \$6,667 on the first six or the last counts of the declaration (relating to policy 729605), because the injuries described were received by the insured while he was engaged in the occupation of a weaver, which was classed by the defendants as "ordinary" and involved a higher premium than the "Select" class, to which Wilkinson was accredited in the policy.

Fifth. The plaintiff should not recover over \$2,667 on the 7th, 8th, 9th, 10th and 11th counts of the declaration (relating to policy 176163), because at the time of receiving the injuries the insured was engaged in the occupation of a weaver.

The plaintiff joined issue on the first plea and replied to each of the others double, by a replication "*de injuria*" and a direct traverse.

Upon the issues thus formed the cause came to trial before a jury. There was no controversy on the facts. The plaintiff produced her witnesses, much of whose testimony was given over the objection of defendant, and rested. The defendant offered no evidence, but moved for a peremptory instruction, which was refused. The jury found, as above stated, for the full amount claimed by the plaintiff.

A motion for a new trial was made in writing by the defendant, based on the following reasons:

First. That the court improperly admitted and refused to strike out evidence.

a. As to the disposition and temperament of John Wilkinson;

b. As to his practice and habits in making targets (for archery) in and using the loft of the barn in the

rear of 482 LaSalle avenue, in Chicago (the place where he received the injuries);

c. Relating to the position and condition of the doors and windows in said loft while Wilkinson was at work therein prior to the time of receiving the injuries in question;

d. Relating to the making of the target found in said loft after the injuries in question were received;

e. Relating to the manufacture and sale of targets by Wilkinson, his sons and the Hope Chemical Company, prior to and after the injuries in question were received;

f. Relating to the relations of Wilkinson with other members of his family;

g. Relating to the physical condition of Wilkinson while at the Alexian Brothers Hospital and of his body at the time of the autopsy thereon;

h. Of the habits of Wilkinson relative to smoking tobacco and cigars.

Second. That the court permitted plaintiff's attorney to make improper assertions and arguments to the jury, and allowed said improper assertions and arguments to stand.

Third. That the court refused to give to the jury the peremptory instruction asked by the defendant at the close of the plaintiff's case.

Fourth. That the court improperly gave to the jury the first, second and third instructions asked by the plaintiff.

Fifth. That the court improperly refused to give instructions numbered from one to twelve, asked by the defendant.

Sixth. That the verdict was against the law and the evidence, and was excessive.

The court, after argument, overruled the motion for a new trial and gave judgment on the verdict. From that judgment the defendant appealed. In this court it assigned errors covering the reasons set forth in the lower court for a new trial, but has insisted in

argument upon the following points under them only:

First. That the evidence fails to show that the insured's injuries were effected through accidental means.

Second. That the evidence fails to show that the injuries sustained by the insured were in consequence of the burning of a building.

Third. That the evidence fails to show that the insured was in the building at the commencement of the fire.

Fourth. That the court erred in denying defendant's motion for a peremptory instruction.

Fifth. That the court erred in admitting evidence—

A. That Wilkinson was an inveterate smoker and in the habit of smoking almost all the time while at work.

B. That Wilkinson was of a cheerful, lively, hopeful, happy disposition and temperament.

Sixth. That the court erred in giving the first instruction requested by plaintiff and hereinafter set forth.

Seventh. That the court erred in refusing to give the 1st, 2nd, 3rd, 7th, 8th and 11th instructions (hereinafter described), requested by the defendant.

Eighth. That the court refused to grant a new trial on account of the preceding matters and because the verdict was against the weight of the evidence.

The facts developed by the evidence were:

John Wilkinson, the insured, resided at No. 482 and 484 La Salle avenue, in Chicago. This is on the west side of the street between Goethe and Schiller streets. The house was a double one and in the north half of the house, or 484, the Hope Chemical Company (in which the insured, John Wilkinson, and his son, John Wilkinson, Jr., were interested, the former being secretary and the latter president and treasurer of it) had their offices and manufactory. The company there, under Mr. Wilkinson's direction, manufactured an ointment or salve, to which the name of "Chiolin"

had been given, and which the company sold to physicians and drug stores. The insured, Mr. Wilkinson, was in September, 1904, not far above or below sixty years of age. His exact age does not appear in the record, but he was old enough to have a son then thirty years old and young enough to be enthusiastically fond of sports, a constant practicer in archery and a participant in archery contests. He was married, with at least two sons in business, and was on the best of terms and relations with his family, and was of a sunny, cheerful, humorous disposition and temperament. During the first week of September, 1904, and before, he was in good health, happy, hopeful and cheerful. He had a summer home at Fox Lake, Illinois, and his wife and at least one son were there all or most of the time during the Summer of 1904. His habit was to go there and stay with his family for a few days every little while during that Summer, and then return to his house in Chicago for a few days, attending to the business of his company. Mrs. Lannon, a woman for many years an employe of the family in one or another capacity, was in the Summer of 1904 (and apparently from her testimony also in former years) housekeeper for the Wilkinsons at 482 and 484 La Salle avenue, while Mrs. Wilkinson was at Fox Lake. She prepared Mr. Wilkinson's meals and attended to the other household duties in the kitchen and elsewhere. She testified that when she was ready she rang the bell and he was always there to attend to his meals. His younger son—a young man—employed as clerk in a business office in the city, seems to have slept in the house, and perhaps have taken his meals, except the midday one, there during the Summer of 1904, but he was not there during the day. On September 7th, after the midday meal, which was prepared for Mr. Wilkinson by Mrs. Lannon, there was nobody about the house except himself, Mrs. Lannon and a laundress, who came to the house to wash and was in the laundry. In the rear of

No. 482 was a two story brick barn with a flat gravel roof, opening from the east side of the alley running north between Goethe and Schiller streets, and opening also from the back yard of 482 and 484 La Salle avenue. The yard door was a small door; the alley doors were double, swinging inwardly. The second floor or "barn loft," as it was called in the testimony in this case, was reached by stairs located in the northeast corner of the building. These stairs were enclosed on the sides and had a door at the bottom. The second floor contained a large room, designed for a hay loft, and a small room making an L from the southeast corner, designed for a coachman's room, but disused for that purpose for many years. It would seem that the barn below was not at that time in use for stabling. At all events, the loft was not used for hay. The walls of the small L room were plastered, but those of the large room or "loft" were unplastered. The loft contained only two windows, both in the east wall, one in each room. The window in the large room was above the stairs near the north wall. There was a scuttle hole in the roof, about the center of the large room, with a matched board covering. There was a large doorway in the west or alley side of the room, with double doors swinging inwards. The joists supporting the roof were made of soft wood and were not ceiled, but exposed. The floors, partition and roof boards were made of soft wood, tongued and grooved. This loft in the Summer of 1904 was used as a store room, and was also used as a work room in which Mr. Wilkinson and his two sons made archery targets. They made these targets for their own use, and also made a few which they sold for the account of the Hope Chemical Company. These targets were made of straw and were 48 inches in diameter and five or six inches thick, covered on one side by a white oil cloth face with concentric colored rings thereon. They were made by tying together with twine strips of straw twelve or fourteen feet long, doub-

ling and winding some of it to make a center, winding the rest around that center, and sewing the whole with heavy marlin. In making these targets the straw was taken up to the loft in handfuls about as large as a man's arm, and laid along the floor in these long strips. Mr. Wilkinson, the insured, laid out the straw and generally superintended the work, in which the young men assisted. They had a bench in the loft made of a board or boards resting on boxes, which they used while working.

About ten days before September 7, 1904, Mr. Wilkinson, with his younger son, who had come in from the Summer home at Fox Lake, had been working on some targets, which were being made for the account of the Hope Chemical Company. The arrangement of the doors and windows in the loft, whenever they worked, depended on the weather. If the wind blew from the west strong, it would blow the straw so that it could not be satisfactorily worked if the alley doors were opened, so they were kept shut and closed on such occasions by a piece of timber set against them. So too, on hot, bright days in the afternoon, the doors were kept closed as a protection against the sun. At other times the doors were sometimes opened, one or both, but the windows were almost always kept closed. There was light enough to work by coming in at the windows, and if the sun was shining brightly it would shine through the cracks at the bottom of the door, which did not shut tight, and much light was given thereby also.

During the ten days preceding the 7th of September Mr. Wilkinson had spent several days at Fox Lake, where, in good health and spirits, he had been repairing a boat, making bow strings, instructing his son how to make them, and practicing archery. He returned from there on Monday evening, September 5th. There was a target in the loft not quite completed on the 7th, on which Mr. Wilkinson was to do some special work.

The 7th was a hot day and the sun was shining brightly. On the afternoon of that day, at about two o'clock, after Mr. Wilkinson's midday meal, Mrs. Lannon, who was working in the kitchen of the house, saw Mr. Wilkinson place a target, arrows, and pencil and paper with which to keep score, in the back yard near the kitchen door, and then go to the barn. He had been there for some time when a boy came to the basement of the house and asked for some oyster tins. Mrs. Lannon, not being able to tell the boy anything about them, went out to bring Mr. Wilkinson in or to ask him about them, and met Mr. Wilkinson coming towards the house. He came in and talked to the boy, and then went back to the barn. Mrs. Lannon then noticed that he had a partly smoked cigar in his mouth. This was the last seen of Mr. Wilkinson until at about a quarter to four o'clock that afternoon he was removed from the barn loft, unconscious and suffering from the injuries by burning from which he afterward died, as hereafter detailed.

At about 3:40 p. m. an alarm of fire from the alarm box at the corner of Goethe and Wells streets reached the fire engine house at 437 Wells street, and also the police station at Larrabee street and North avenue.

The firemen of the company at once responded with the hose wagon, locating the fire immediately by report as being in the alley off Goethe street, and finding when the wagon reached there "smoke coming out of the cracks all over the barn, on top of the roof" and "around the hay loft and along the roof on the alley side and on the south side of the south wall along up towards where the rafters come down over the top of the brick work." The police station also responded at once with a patrol wagon, containing a stretcher. The patrol wagon stopped at the corner of Goethe and Wells streets. The policemen cleared the alley to avoid the interference of a crowd with the work of the firemen. Lieutenant Franzen, in command of the fire company, who drove the hose cart, stopped it back

of the barn, with orders to unreel a length of hose, and when another fireman had placed a ladder against the barn reaching to the loft doors, ran up it with an ax and smashed them in. He was met, he says, "with a blaze of smoke and hot air. I told the fellows when I saw the blaze what it was, and jumped down from the ladder, got my fire hat—I turned the hat down so as to protect me from the heat." One fireman—Shaw—was then standing by the ladder with a hand-pump, and after sending another to order water from the engine, Franzen, with Shaw, went up the ladder with the pump and a five gallon water tank, and played a small stream on the fire to keep it down until the big stream should come from the engine. Shaw was inside with the nozzle, and Franzen, with one foot on the ladder and one inside, was working the pump. There had been a cry in the alley that there was a man in the barn, but Franzen says he could see nothing but smoke and flame, and could not see across the room.

Another fireman—Schmelzer—came up the ladder alongside of Franzen, and taking the pump from him commenced to work it, when Shaw, inside, said, "There is a man over there," and indicated the direction. Schmelzer crouched low to the floor and went southeasterly in the direction indicated. The room was heavily charged with smoke. He had to turn his head and hold his breath lest he should inhale flame. After going six or seven feet he struck some straw with his feet, stretched out his hand and felt of the straw, made a further stretch and caught a man's right hand, then seized his wrist and dragged him to the door. It was Mr. Wilkinson in an unconscious state and severely burned. Shaw helped Schmelzer to lift the man (who was of light weight) into Lieutenant Franzen's arms, who carried him down the ladder, still unconscious, to the stretcher from the police patrol wagon. He was then carried in the wagon to the Alexian Brothers Hospital. Besides his exterior

burns, hereafter described, he seemed, as the policeman, Geis, in charge of the wagon, testified, to be burned internally from inhaling heat, and was patting his chest and speaking or trying to speak. Whether he had then entirely recovered consciousness or not, does not appear. His utterances, if any, at that time on his injuries or their cause or the origin of the fire, and those made afterward at the hospital before his death, when he was conscious and conversed with his wife and sons and friendly physicians, were excluded from evidence on the objection of defendant.

It was found at the hospital and at the autopsy after his death, that he had been severely burned on both sides of his face and neck, on his back, on both hands, parts of his left hand being completely charred, and on the front of his legs. One-third of the area of his body was burned either to the first, second or third degree. There was also an inflamed and blistered condition of the larynx, caused by the inhalation of hot air.

It is in evidence that during these two days he was in fairly comfortable condition and expected to recover, although the physicians recognized the fact that his injuries were fatal. He died on September 9th.

When Lieutenant Franzen was carrying Mr. Wilkinson from the foot of the ladder to the patrol wagon, the water had already been turned on from the engine. Franzen was so informed at the foot of the ladder, and shouted to the firemen in the barn to look out for the water. Therefore a few seconds, after Mr. Wilkinson was taken out, the water reached the barn, the pipe nozzle of the big hose was opened, and an inch and a quarter stream turned on the burning ceiling and dashed about. In two or three minutes the flame was out of the loft, and in a minute or two more the ceiling had stopped burning. Then, in order to avoid flooding the building, the nozzle was changed to a quarter inch or pin stream, which was also played on the rafters or joists to get the fire out and prevent

rekindling for some minutes, after which the company was ordered back to quarters. Just as Franzen reached the bottom of the ladder with Wilkinson in his arms, Pipeman Ryan of the fire company, who had been coupling the engine to send the water, ran by him through the lower floor of the barn and up the stairs to the loft and broke the window at their head to let the smoke out and the air in. Then he went to the window in the L room and broke that out. Some other fireman, at about the same time, broke open the scuttle hole in the roof.

The condition of the barn loft as to the burning already consummated when Wilkinson was found and taken out, is a subject of contention between the parties in argument. Three men (besides Wilkinson) are shown to have seen it before he was taken out—Franzen, Schmelzer and Shaw. Ryan saw it only so long afterward as it took him to get from the alley doors of the first floor to the head of the stairs on the second—scarcely an appreciable time, it would seem, under the circumstances. Franzen, Schmelzer and Ryan were witnesses.

Franzen's testimony as to what met him when he smashed the doors in has been given. He testified further that immediately after his return and the big stream had been turned on the ceiling, he noticed that some of the floor was burned.

Schmelzer testified that when he got up to the loft he saw the flame and was obliged to crouch low and turn his head and hold his breath lest he should inhale the heat, and in answer to direct questioning, said that there was some straw burning and that the roof was burned and the ceiling inside the roof and the floor, before he got Wilkinson out, and that after Wilkinson was taken out there was some straw and a couple of boxes and a board burned, and that the flame from the ceiling continued but two minutes, and the fire three or four only, from the time the big stream was turned on the ceiling, which, as has been noted, was almost

contemporaneous with Wilkinson's removal; that the ceiling where the rafters burned was directly over the place where straw was lying on which Wilkinson was found, and from there extending towards the alley doors. In cross-examination he was asked if "It was after you took him out and the smoke cleared away, so that you could see, that you observed the condition of the roof and the floor?" And answered, "I saw the flame go up there before I got to him, go towards the roof." Asked "If it was not true that only the floor underneath the straw where Wilkinson was lying, was scorched?" he answered, "It was burned more than that—I wouldn't take the burning it got for that."

In re-direct examination these questions and answers occurred:

"Q. When did you first notice that the ceiling or the rafters of the ceiling, or the rafters of the ceiling of the barn, were blazing?

A. As soon as I got in there.

Q. Now, do you recall when it was you first noticed the target?

A. Excuse me a minute—you asked when I noticed the rafters were burning?

Q. Yes, sir.

A. When I first noticed them?

Q. Yes, sir.

A. That was, let me see—that was right after we got Wilkinson out, I believe, that I first noticed it.

Q. After what?

A. After I got Mr. Wilkinson out, that I first noticed it. When I noticed it, that was when I went over to get him. I saw the flame going up towards the ceiling alongside of where I got hold of Mr. Wilkinson, and then we got the water and we hit the ceiling. I figured on it went up agin the ceiling, the burning ceiling. We hit it and while I was working the line on the ceiling, they raised this scuttle hole, that

took the smoke out, and then I saw the ceiling was still burning in places.”

In re-cross-examination occurred the following questions and answers:

“Q. When did you begin to play the small hose on the ceiling?

A. That was after we wet the whole ceiling down with a one-inch and one-eighth or one inch and one-quarter, and we used that afterwards in order not to flood the building.

Q. That was after the body had been taken out?

A. Yes.

Q. The ceiling was on fire then, wasn't it?

A. Yes.

Q. When you took this large hose that you speak about to throw a large stream of water against the ceiling, the smoke was so thick up above your head that you could not see the ceiling, wasn't it? A. Yes, sir.

Q. You could not tell what was going on up there?

A. No, sir.”

Ryan testified that when he got up to the loft he found a lot of smoke and saw some flames around the south wall, and that after the fire was put out he saw the rafters were burned near the roof, and that the floor and boxes were burned. In cross-examination he said that the floor was burned at a place about six feet from the west wall and six feet from the south wall, that there was straw lying around the burnt spot; that he did not look over the floor; but that was the only place that he noticed where the floor was burned; that the rafters and the roof were burned over the place burned in the floor; that after the fire was over he could see how much the rafters were burned, and that some were burned worse than others and more than a quarter of an inch deep.

The condition of the barn loft after the fire was over was described by Arthur Wilkinson also, who

saw it about six o'clock that evening. About one-quarter of the surface of the ceiling was burned, the rafters were badly charred and the boards of the roof above them. The piece of the ceiling thus burned was about twelve feet square, and directly above where the floor was burned. The floor was charred in the southwest corner of the loft.

Schmelzer also testified that the floor, although not burned through, was burnt a quarter of an inch or more deep, and the rafters charred to the same depth.

The quantity and condition of the straw in the loft before, during and after the fire also figures in the argument.

As before noted, the straw with which Mr. Wilkinson worked in making the targets was taken up to the loft in handfuls about as large around as a man's arm, and laid along the floor in strips twelve to fourteen feet long. Arthur Wilkinson testified that on the day of the fire there had been only three or four armsful of this straw in the loft, scattered around the floor, but straightened out, and that when he got there at six o'clock there was none there—that it had been thrown out. Schmelzer, as noted, said that in groping for the man said to be in the barn, he struck some straw with his foot and afterwards with his hand, and that there was some straw burning both before and after he got Mr. Wilkinson out. His further testimony about the straw was, that after they had taken Wilkinson out, he saw straw lying about where Wilkinson was found; that the part of the floor that was burned was about where the straw had been lying; that he helped clean up the place and throw the rubbish out; that he should "guess" the straw Wilkinson was lying on was more than three or four inches thick; that they threw out into the alley a big armful, almost as much as a man could carry. He explained this afterward to mean that all the straw that was in the loft—that which was unburned and (judg-

ing by the ashes) that which was burned—would have made such an armful.

Franzen testified in cross-examination that "There wasn't much of anything in the loft" (meaning after the fire) only a little wet straw that they swept up in the part where Mr. Wilkinson was lying—straw which had been wet with the water from the pump and the engine hose.

Ryan, after the fire was put out, observed some straw on the floor, together with boards and boxes and part of an old target, and the straw was lying about the burned places on the floor and right around the boxes. He was cross-examined thus:

"Q. Did the straw lying on the floor in that spot all look like it had been burned?

A. What was left of it looked as if—

Q. It had been burned? A. It had been burned.

Q. Were there ashes of the straw lying scattered all about? A. Yes, sir.

Q. Did that extend north of the boxes?

A. It extended directly right south.

Q. How close to the boxes did the ashes go?

A. I could not say how close to the boxes."

The following admissions were formally made on the record by the defendant company at the trial, it waiving proof of the facts thus admitted:

First. That it issued and delivered to John Wilkinson, the plaintiff's testator, the two policies of insurance numbered 729605 and 176163, as set forth in the declaration.

Second. That both of said policies of insurance were renewed and premiums therefor paid, for and during a period covering the 7th day of September, A. D. 1904.

Third. That on the seventh day of September, A. D. 1904, while said policies were in force, the said John Wilkinson suffered injuries in Cook county, Illinois, effected through external and violent means,

from the result of which injuries solely the said John Wilkinson died on the ninth day of September, A. D. 1904, in the county aforesaid.

Fourth. That said John Wilkinson left a last will and testament, naming the plaintiff as the sole executrix thereof, which will was duly probated and of which the plaintiff was appointed executrix.

Fifth. That all notices and proofs specified in and required by the sixth clause of policy 729605 and the fifth clause of policy 176163 were furnished to the defendant in the manner and within the time specified in said clauses, and received and accepted by the defendant and by it retained without any objection thereto.

It will be seen that these admissions and the evidence detailed left as issues of fact, to be decided by the jury in the Superior Court, only the questions, first, whether the injuries from which Wilkinson died were effected through "*accidental*" as well as "external and violent" means; and, second, if so, whether these injuries were "sustained in consequence of the burning of a building in which the insured was at the commencement of the fire," thus making due to the executrix the double indemnity stipulated in clause f. of policy 729605.

The jury having answered both these questions in the affirmative, the questions for this court are, whether the verdict should be set aside for lack of, or as clearly against the weight of the evidence; and if not, whether there was reversible error in the instructions given, or in the refusal of those refused, or in the admission of evidence.

Of the three instructions given at the instance of the plaintiff, only the first is complained of by the defendant. It was as follows:

"The court instructs you that where a man suffers injuries which might have been caused by accident or might have been intentionally inflicted upon himself, and there is no preponderating evidence as to the

cause of such injuries, the presumption is that they occurred by accident."

The court gave, at the instance of the defendant, twelve instructions, numbered from thirteen to twenty-four inclusive, but refused twelve offered at the same time.

In the respective arguments of the parties, the defendant claims that it was error to refuse the instructions numbered 1, 2, 3, 7, 8, 10 and 11, and the plaintiff insists that so far as they correctly stated the law, these were covered by those numbered 14, 15, 16, 17, 20, 21, 22 and 23.

The instructions named are therefore here given, to complete this statement.

Those enumerated which were given were as follows:

"14. The jury are instructed that to entitle the plaintiff to recover the double indemnity provided for in clause f. of policy numbered 729605, you must find from the evidence the following material facts: first, that John Wilkinson suffered injuries effected through external, violent and accidental means; second, that he sustained such injuries in consequence of the burning of a building; third, that he was in said building at the commencement of the fire; and, fourth, that his death resulted solely from such injuries within ninety days. And you are further instructed that if you are unable to find from a preponderance of the evidence and under the instructions of the Court in this case, either one of those facts, then the plaintiff is not entitled to recover such double indemnity.

"15. In the policy sued upon in the first, second, fourth and fifth counts of the declaration herein, it is provided that if the death of the insured resulted solely from injuries effected through external, violent and accidental means in consequence of the burning of a building in which the insured was at the commencement of the fire, the amount to be paid under such circumstances should be double the sum other-

wise payable in event of death. Before the defendant can be held liable under the provision of the policy for double the sum otherwise payable in the event of death, it is incumbent upon the plaintiff to show by a preponderance of the evidence not only that the death of the insured resulted solely from injuries effected through external, violent and accidental means, within the meaning of the policy, but that such injuries were sustained in consequence of the burning of a building in which the insured was at the commencement of the fire. Before you can find the defendant liable under this provision of the policy you must believe from a preponderance of the evidence that the injuries sustained by John Wilkinson were directly and proximately in consequence of the burning of the building, and that John Wilkinson was in the building at the commencement of the fire. It is necessary that both of these facts be established by a preponderance of the evidence.

"16. The declaration in this case alleges, among other things, that the insured, John Wilkinson, suffered injuries effected through external, violent and accidental means, from the result of which injuries solely the said John Wilkinson died within ninety days thereafter. The defendant pleaded the general issue, which makes it incumbent upon the plaintiff to prove by a preponderance of the evidence that the death of the insured was the result of external, violent and accidental means, and the jury is not permitted to assume the existence of such facts because they are alleged in the declaration.

"17. The court instructs the jury that the defendant sets up in its pleas that the injuries to the plaintiff were self-inflicted. The presumption of law against self-inflicted injuries places the burden upon the defendant to establish that defense. This does not mean that the defendant, in order to establish that defense, must have a witness or witnesses testify as to that fact in its behalf. This defense may be established, or the presumption of law against self-inflicted injuries may be overcome by the evidence introduced by the plaintiff or by such inferences as the jury may

rightfully and reasonably draw from such evidence; and the fact that the defendant has not seen fit to introduce any evidence in this case does not relieve you from the duty of determining from the evidence in the case whether the injuries sustained by John Wilkinson were self-inflicted.

“20. If the jury believe from the evidence that the injuries sustained by John Wilkinson were caused by the body of said Wilkinson coming in contact with fire, this fact satisfies the requirements of the policy in relation to the injuries being effected through external and violent means, but does not satisfy the requirements of the policy that the injuries must result from accidental means, and it is incumbent on the plaintiff to prove by a preponderance of the evidence that the injuries resulted from accidental means.

“21. The law presumes, in the absence of evidence to the contrary, that John Wilkinson, at the time he entered the loft, was sane and in full possession of his mental faculties in their normal condition; that he was then conscious; that any act done by him in the loft was voluntary; and that he contemplated the probable and natural consequences of his voluntary acts. And the court instructs you that the law presumes each of these conditions to exist upon the part of John Wilkinson until the contrary is shown by a preponderance of the evidence.

“22. The fact, if you find from the preponderance of the evidence that it is a fact, that John Wilkinson sustained injuries by his body coming in contact with fire, does not in itself raise a presumption that the means effecting the injuries were accidental nor relieve the plaintiff from the burden of proving, by a preponderance of the evidence, that the means causing the injuries were accidental. The law presumes, in the absence of evidence to the contrary, that the injuries sustained by John Wilkinson were not self-inflicted; but this presumption alone is not sufficient to warrant you in finding that the means producing the injuries were accidental.

“23. If the jury, from all the evidence, is unable to find that the injuries to the assured were sustained in

consequence of the burning of the building, or that the insured was not in the building at the commencement of the fire, or if the jury believe that the preponderance of the evidence shows that the injuries to the insured were not in consequence of the burning of the building, or that the insured was not in the building at the commencement of the fire, the Company is not liable under clause f. of the policy numbered 729605."

The proffered instructions, the refusal of which is complained of, were as follows:

"1. The jury are instructed that the words 'If injuries are sustained by means aforesaid in consequence of the burning of a building,' contained in clause 'f' of the policy numbered 729,605, mean that such injuries must be sustained not only through external, violent and accidental means, but they must also be sustained by reason of, or as the effect of, the burning of a building. And you are further instructed that if you believe from the evidence that the building did not burn until after the injuries were sustained by the insured, then the plaintiff is not entitled to recover the double benefit provided for in said clause 'f'.

2. If the jury believe from the evidence that the injuries sustained by John Wilkinson were solely in consequence of the burning of straw in the loft of the barn, and that the burning of a building was not the proximate cause of the burning of the straw, then the court instructs you that said injuries cannot, under the law, be said to have been in consequence of the burning of a building, and you must find for the defendant upon that issue in the case.

3. The jury are instructed that in order to recover in this case it is necessary for the plaintiff to prove by a preponderance of the evidence, or it must appear from the evidence, that the death of the insured was the result of accidental means, otherwise the plaintiff cannot recover. The jury have no right to indulge in conjectures or speculations not supported by the evidence; and in determining whether the injuries to the deceased were or were not effected through accidental means, the jury must confine themselves to the evidence and such inferences as they believe may be right-

fully and reasonably inferred from the evidence given in the case. The jury have no right to assume the existence of any fact not shown by the evidence to exist, and if they cannot find for the plaintiff without assuming the existence of such fact or facts not so shown to exist, their verdict must be for the defendant.

7. There is no evidence in this case as to when the fire in question was started, and the Court instructs you that you have no right to indulge in any conjecture or speculation as to when it was started in determining the question whether John Wilkinson was in the building at the time of the commencement of the fire.

8. The court instructs the jury that in the absence of evidence as to when the fire in question commenced, they have no right to infer that it commenced after the deceased entered the barn.

10. If the jury believe from the evidence that the fire in question originated in the straw in the loft of the barn and that before said fire was communicated to the building John Wilkinson sustained the injuries in consequence of which he subsequently died, then the court instructs you that the plaintiff has no right to recover under clause 'f' of policy numbered 729605.

11. The court instructs the jury that the word 'building' as used in clause 'f' of policy numbered 729605 is understood to have been used in its ordinary and customary sense, but that the straw in the loft of the barn, if you believe from the evidence there was straw in the loft, was not a part of the barn in question, nor a part of a building within the meaning of the policy; further, that the burning of the straw, if you believe from the evidence that the straw was burning, does not constitute the burning of a building within the meaning of the policy."

DANIEL F. FLANNERY and ILLA H. SAMPLE, for appellant.

SAMUEL ADAMS and CARL R. LATHAM, for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

The argument of the appellant (defendant) in this case that there was no evidence in the cause sufficient to sustain a finding of the jury that the injuries from which Mr. Wilkinson died were effected through accidental means, is subtle rather than forceful. Reduced to its lowest terms, it is tantamount to the position that evidence to be sufficient must be direct. But circumstantial evidence is frequently as satisfactory and not infrequently more satisfactory than direct evidence to establish the existence or occurrence of any fact, and in accordance with this hypothesis all the affairs of men are conducted. "Presumptions on presumptions," "mere conjectures," "simple speculations," and like expressions, are used by courts to show what a jury may not indulge in, but no court has said, in a case like this, where no living witness can be produced to testify directly to the happening of an accident, that happening cannot be inferred by a jury from other facts viewed in connection.

A man in good health and spirits is accustomed to work with straw in his barn loft and smoke the while. He has been engaged on a piece of such work, which was unfinished on a certain day. He is seen on that day to go to the barn loft, remain some time, come to the house on a trivial errand and return to the barn with a half smoked cigar in his mouth. After an hour or so, in which nobody sees him come from the barn, although there are people in the rear of the house, there is an alarm of fire; the barn loft is broken into by firemen, the straw and the wood work are on fire, the flames and smoke are overpowering, and the man is found unconscious and burned so severely that he dies from the effects. What inference from any facts could be more inevitable for any court or jury disposed to look at plain facts in a common sense way, than that the burns which the man had suffered were "effected through accidental means," or else were

“intentionally self-inflicted?” There is no third hypothesis conceivable except through a refinement of distinctions not consistent with the ordinary processes of reasoning.

To argue that the acts of the insured which led to the fire may be considered intentional and voluntary, but the result unintentional, and that therefore the injuries, although accidental, were not “effected through accidental means,” is, under the circumstances of this case, to propose a fantastic if not unthinkable theory. It can only mean that it may be supposed that the insured consciously and voluntarily meant to wrap himself in smoke and flame from fiercely burning material, and yet not be injured. It is a very different case from that of a person who takes a poisonous drug voluntarily in a quantity which he intends, but misjudges the effect of the dose, and thus kills or injures himself, when his purpose was the exact opposite. In such a case cited by the appellant (*Carnes v. Iowa State Traveling Men’s Association*, 106 Ia. 281), a distinction between “accidental” and “effected by accidental means” was made, but there cannot reasonably be such a distinction made in the case at bar.

It is conceded by the appellant that “the law presumes in the absence of evidence to the contrary, that the injuries sustained by John Wilkinson were not self-inflicted” (defendant’s instruction 22), but insists that this presumption has no probative force to establish the fact that the injuries were effected by accidental means. Under the facts and circumstances proven in this case, this last proposition is practically equivalent to denying the first. It is simply to repudiate the presumption against intentionally self-inflicted injuries. There being in reason but two alternatives, a presumption against one must at least aid and form a part of the proof of the other.

It is this that distinguishes this case from such a one as *The Globe Insurance Company v. Gerisch*, 163 Ill. 625, relied on by appellant. In that case, to sus-

tain a verdict, it had to be presumed or inferred that the deceased lifted a heavy box of ashes, and then presumed or inferred that a strain from which he afterward suffered was the result of that lifting. Perhaps either inference singly might have been properly made had the other been a matter proved, but the sequence could plainly not be. There were an infinity of causes that might have caused the strain, other than the one which, as the court says, was in itself "but a presumption drawn from other facts in evidence," namely, that the insured had lifted the box of ashes. We fail to see an analogy in the Gerisch case to the one at bar.

On the other hand, the authorities are many and forceful which declare that in a case like the present, circumstantial evidence concerning the death or injury, without proof of the precise manner in which it occurred, aided by the presumption against suicide or self-infliction of injuries, sufficiently satisfies the requirement, which is undoubtedly the general rule as dwelt upon by the appellant, that the claimant under an accident insurance policy must prove that the death or injury occurred through accidental means. And it has often been further held that external and violent means having been proven, the presumption against self-inflicted injuries and against murder, without further evidence, involves a *prima facie* showing of "accidental means." Travelers Ins. Co. v. McConkey, 127 U. S. 661; Mallory v. Travelers Ins. Co., 47 N. Y. 52; Fidelity & Casualty Company v. Freeman, 109 Fed. R. 847; Aetna Life Ins. Co. v. Milward, 118 Ky. 716; Cronkhite v. Travelers Ins. Co., 75 Wis. 116; Lumpkin v. Insurance Co., 11 Colo. App. 249; Preferred Accident Ins. Co. v. Fielding, 35 Colo. 19; Warner v. Accidental Association, 8 Utah, 431; Jones v. U. S. Accident Association, 92 Ia. 652; Conadeau v. American Accident Company, 95 Ky. 280; Travelers Ins. Co. v. Sheppard, 85 Ga. 751; Insurance Co. v. Bennett, 90 Tenn. 256; Standard Life & Accident Ins.

Co. v. Thornton, 100 Fed. R. 582; Jenkin v. Pacific Mutual Life Ins. Co., 131 Cal. 121; Meadows v. Pacific Mutual Life Ins. Co., 129 Mo. 76; Fidelity & Casualty Co. v. Weise, 182 Ill. 496.

In our examination of these cases, we have given due consideration to the argument of the appellant that in some the language which sustains the position we have indicated must be considered *obiter dictum*, and in some the result of a misinterpretation of the early case of Mallory v. The Travelers Ins. Co., 47 N. Y. 52, and that some of the cases we have named sustain the position of the defendant and not that of the plaintiff, while others are radically unsound. But we are not convinced by it. It seems to us that the general concensus of opinion in these authorities, whether the theory was directly involved or not, and whether the given case went off on it or not, is expressed, for a case like this, by the Circuit Court of Appeals of the United States for the Sixth Circuit, when it says:

“The death under such circumstances was by violent and external means, and the facts exclude every hypothesis except suicide or accident;” and then, speaking of the presumption against suicide, declares:

“This presumption must stand in the case and be decisive of it until overcome by testimony which shall outweigh the presumption” (Standard Life & Accident Ins. Co. v. Thornton, 100 F. R. 582); and by the Supreme Court of California when it says:

“That the courts will presume that the death was the result of an accident when nothing more is shown than that it was brought about by a violent injury, and the character of such injury is consistent with the theory of accident, seems to be a rule upheld by a great weight of authority;” and “If the circumstances placed in evidence and the inferences to be drawn therefrom and the presumptions arising thereon point clearly to an accidental injury, the plaintiff has made out a *prima facie* case and is entitled to a finding in

his favor.” *Jenkin v. Pacific Mutual Life Ins. Co.*, 131 Cal. 121.

Moreover, we think that this theory, instead of being “radically unsound,” as the defendant claims, is consistent with right, reason and common sense, and was sanctioned by our Supreme Court in a case relied on by the defendant, but which in fact was decided on the question on whom the burden of proof was cast, not on the question of what would sustain that burden. In *Fidelity & Casualty Co. v. Weise*, 182 Ill. 496, the Supreme Court said: “The presumption of the law is that all men are sane and possessed of the love of life, are animated by the instincts of self-preservation and a natural desire to avoid injury and death. This presumption, in the absence of countervailing proof, may be sufficient in itself to establish that the death occurred otherwise than by self-inflicted injuries, and to cast upon the defendant company the burden of producing evidence on the point.”

We do not see how the pertinency of this doctrine regarding the probative force of the presumption against self-inflicted injuries is affected in the present case, where there was no “countervailing proof,” by the fact that in the *Weise* case there was strong countervailing evidence, the production of which left the burden of proof still on the plaintiff and called from the court the further statement that “the existence of the presumption” (against suicide) “had no efficacy to change the rule that the obligation of proving any fact lies upon the party who asserts the affirmative of the issue. In *North Chicago Street Railway Co. v. Louis*, 138 Ill. 9, we said: ‘There may be evidence which, standing by itself, establishes a certain state of facts, but the evidence does not preponderate in favor of any given state of facts unless it is sufficient to outweigh all testimony introduced in opposition thereto.’”

In the case at bar not only was there no evidence offered tending, in the slightest degree, to establish or

suggest suicide or self-inflicted injuries, but moreover, in the exercise of a discretion undoubtedly vested in him (*Dimick v. Downs*, 82 Ill. 570-2; *Mayer v. Brensinger*, 180 Ill. 110-120), and in view of the pleas filed by defendant, the trial judge allowed the plaintiff to anticipate the suggested defense, and produce evidence in her case in chief, which aided and fortified the presumption against suicide or self-inflicted injuries, by showing a disposition, a temperament, a character, a physical condition and habits on the part of the deceased tending strongly to negative the probability of any self-infliction of the injuries in question.

The injuries, the defendant concedes in its reply brief, "doubtless unintentionally resulted in the death of the insured." It proceeds, nevertheless, to hint that the surroundings proved by the plaintiff looked toward self-inflicted injuries. The suggestion is without force in view of the evidence. It is so improbable as to be fantastic.

The views we have expressed dispose for us, not only of the contention of defendant that evidence is wanting to sustain a verdict for the plaintiff, and that the weight of the evidence is against any liability on the part of defendant, and of certain of its claims regarding the admission of improper evidence, but also of its criticism on the first instruction given at the request of the plaintiff.

We do not think this instruction was erroneous. If, as claimed by the defendant, the twenty-second instruction asked by the defendant and given, was inconsistent with it, which we do not feel called on to discuss, giving the twenty-second as asked was an error committed at the request of defendant, of which it cannot complain.

We are therefore brought to the secondary contentions of defendant in the case—that the "double" liability under policy number 729605 was not sustained by the evidence, that the weight of the evidence was against the verdict which asserted it, and that the

Wilkinson v. Aetna Life Ins. Co., 144 App. 38.

refusal of certain instructions which were requested by the defendant concerning it, was erroneous.

Our examination of the questions involved in these contentions leaves us satisfied with the action of the jury and of the trial judge.

The provision involved is a peculiar one. It provides the "double" indemnity for various selected accidents, certainly not more likely to occur than many others, and may well be supposed to be inserted as an additional attraction for the policy in its involving an extraordinary element of chance. Counsel for defendant, perhaps justifiably, repudiate the suggestion that the interpretation that would naturally be placed upon the term "building" in the condition under discussion by the persons to whom policies are sold, as including as well the "contents" of such building, should be controlling, although the illustration used by the plaintiff of "theatre" and "hotel" fires, "fires," that is, within the modern fire proof buildings, is not without force.

But we do not need to discuss this question, for we find nothing in the record which justifies the assertion of counsel for defendant, in the "Reply Brief," that the trial court was not able or willing to appreciate the difference between "the burning of a building" and "the burning of straw within a building."

In our opinion the question whether these injuries, resulting in the death of Wilkinson, were within the special provision of the policy, that is, "were sustained by external, violent and accidental means, in consequence of the burning of a building in which the insured was at the commencement of the fire," was for the jury to determine from the evidence.

We have given the evidence bearing on the question in detail in the statement prefixed to this opinion. Discussion or further analysis of it would not make it clearer. We think that it would justify the finding of any court or jury that the injuries which resulted in the death of the insured were received wholly or

partly after and "in consequence of" the ignition of the woodwork of the building and the heat and flame thereby produced, and not solely from the burning on the floor of the by no means profuse amount of straw, in which the fire very probably begun, perhaps from a lighted cigar of the deceased.

It was not necessary for the jury to determine or to find in what precise manner the fire began or how it proceeded or in what precise manner the deceased received each of the burns which together resulted in his death.

As the court said in *Wright v. Sun Mutual Life Insurance Co.*, 29 Upper Canada Common Pleas, 221-233, "a large proportion of accidental deaths occur under such circumstances that evidence is wanting as to the precise manner in which the deceased met his fate. Where the visible injuries plainly account for death, it can hardly be necessary to explain step by step how it happened."

But the jury, while not allowed to base findings necessary to their verdict on mere conjecture or speculation, or to make inferences necessary to those findings not fairly and reasonably deducible from facts in evidence, were not required, in considering what their findings should be, to exclude altogether from their minds the fact that there were numerous methods by which in pure accident and involuntarily the fire might have started.

That Mr. Wilkinson was in the loft when the fire commenced was, in our opinion, fairly deducible from the evidence. We should not have expected from any jury any other finding from the facts in evidence. That the injuries from which he died were the result wholly, or in material part, of the burning of the building, in contradistinction from its mere contents even, we also think a legitimate inference from the proof.

The evidence, which was admitted over objection,

tending to establish these propositions, we think competent.

This leaves only the question—was there reversible error in the refusal of any of the refused instructions tendered by the defendant? We think there was not.

Three strenuously insisted on—the 2nd, 10th and 11th—were objectionable, under the rule in Illinois, in singling out and calling attention to specific features of the evidence which as a whole were submitted to the jury. They were intended to call attention to the evidence of the burning of straw in the building as distinguished from everything else shown to have been aflame.

The proposition that the double benefit depended on the injuries resulting from the burning of a building was covered by the 14th, 15th and 23rd given instructions. There was no error in refusing to repeat it in the further form asked, that their resulting solely from the burning of something else would not satisfy the requirements of the policy. The defendant's argument on this point seems in the last analysis to be based on the position that the term "building," as used in the policy and the instructions was ambiguous in that it might or might not include a building's contents. If there were no ambiguity in its use in the policy, there was none in the instructions given, and the further instructions refused on the same point were not needed. If there was ambiguity, then the ambiguity must be resolved according to "fully established," "imperative" and "controlling" rules, in favor of the insured, "so as not to defeat his claim to the indemnity which in making the insurance it was his object to secure." *Healey v. Mutual Accident Assn.*, 133 Ill. 556-561.

If there was ambiguity, therefore, the instruction refused would have been erroneous.

The first refused instruction was also covered by the 14th, 15th and 23rd, as given.

Counsel for defendant say in their argument that it

was essential that the expression "in consequence of" should be defined in more common and easily understood words. We know of none. Nor, in our opinion, did the evidence sustain the possible hypothesis included in the instruction, that the building did not burn until after Mr. Wilkinson was taken out.

The third refused instruction, so far as it was correct, was amply covered by those given. It was, in the form tendered, likely to mislead the jury in the direction pointed out in this opinion as indicated by the trend of the appellant's argument here—that is, into a confusion between mere conjectures and speculations on the one hand, and legitimate inferences from facts in proof on the other; in other words, between mere assumptions and circumstantial evidence.

The seventh refused instruction is plainly objectionable. In our opinion the assertion that there was no evidence in this case as to when the fire was started, is incorrect. There was evidence in the time of the alarm and the extent to which the fire had gone when the firemen arrived, from which the jury could legitimately infer approximately the time when it began.

The eighth refused instruction is objectionable because it contained an assumption that there was no evidence as to when the fire in question started. This was inaccurate, as we have pointed out in referring to the seventh instruction. If the assumption were not intended, the instruction was carelessly drafted. Many cases have been reversed by the Supreme Court on account of instructions no more clearly assuming a fact in dispute.

But if the instruction were to be construed as meaning that if the jury could not find from the evidence that the deceased entered the barn before the commencement of the fire, they could not otherwise infer it and give the double benefit provided for in the policy, it was abundantly covered by instructions given.

The objections to the refusal of the five other prof-

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ferred instructions have been waived by not arguing them in this court.

We find no lack of evidence to sustain the verdict and no reversible error in the matter of instructions or in the rulings on evidence. We believe that justice has been done between the plaintiff and defendant, and the judgment of the Superior Court is affirmed.

Affirmed.

Columbia Heating Company, Appellee, v. Michael O'Halloran, Appellant.

Gen. No. 13,961.

1. **AMENDMENTS AND JEOPAILS**—*when denial of leave to file additional pleas not ground for reversal.* It is not an abuse of discretion to deny leave to file additional pleas at the time the cause is called for trial, especially where the issues had been fully formed for eighteen months before the application.

2. **PLEADING**—*when proof of failure of consideration not admissible.* Failure of consideration of a promissory note specially declared upon cannot be shown under the general issue where the note has been offered solely under the special count; nor can such defense be made under the general issue or by way of recoupment.

Assumpsit. Appeal from the Superior Court of Cook county; the Hon. ALBERT C. BARNES, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed October 8, 1908.

O'DONNELL, DILLON & TOOLLEN, for appellant.

BRYAN Y. CRAIG, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

On November 22, 1905, appellee filed its declaration in this action, containing two special counts declaring upon a promissory note in each, and also attached to the special counts the common counts. To the declaration as thus constituted appellant filed, December 5th thereafter, a plea of *non assumpsit* and an affidavit of

meritorious defense. On June 18, 1907, the case being on the trial call of the learned trial judge, counsel for appellant applied for leave to enlarge his defense by filing a plea of failure of consideration and a plea that the notes were assigned after their maturity. This application was denied. The case was called and proceeded to trial on the same day the motion was made to file additional pleas, and on a verdict of the jury instructed by the court a judgment was that day entered against appellant and in favor of appellee for \$273.55. Appellant prosecutes this appeal and asks this court to review the record and reverse the judgment of the Superior Court.

While twenty-one assignments of error appear upon the record, the contentions and arguments of appellant are substantially restricted to two questions: First, did the trial court erroneously deny appellant leave to file two additional pleas upon the day the cause was called for trial? and second, was the ruling of the court, in excluding the evidence proffered by appellant as a defense to the action, error?

First, the issues had been joined for eighteen months at the time the cause was on the trial call, to which time no motion had been made by appellant to interpose any additional pleas.

While it was permissible for the court to grant the motion even at the late date when it was made, still, whether the motion should be granted or not was a matter resting in the sound discretion of the court. Appellee, it may be assumed, had prepared to go to trial on the issues joined, and may not have been prepared to meet any defense not admissible under the pleadings as they stood; nor did the law require him to anticipate that any defense would be proffered not pertinent to the pleadings or admissible under them. In some circumstances it might have been the duty of the court to allow additional pleas to be filed even at the late date the motion was made. If there was any good reason why the motion should have been

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granted, or any lawful excuse why the making of the motion had been so long delayed, appellant failed to apprise the court of such fact by affidavit or otherwise.

What this court said in *Wilson v. Wilson*, 125 Ill. App. 385, is of equal application here. The court say: "To grant such an application to file an additional plea at the time fixed for trial, is either to compel the plaintiff to go to trial at a disadvantage and without previous information as to the defenses to be interposed and preparation therefor, to which he is fairly entitled, or else to force him to a continuance when he is ready for trial on all issues previously presented. This should not be permitted unless a good reason for the delay is shown. No error was committed in refusing leave to file this plea."

Dow v. Blake, 148 Ill. 76, and *Chicago v. Cook*, 204 Ill. 373, are to a like effect.

The judicial discretion vested in the trial judge, so far from having been abused in the denial of appellant's motion to file additional pleas on the eve of the trial, was exercised in wisdom for the promotion of justice. To have done otherwise, in the absence of any excuse for the long continued delay in making the application, would have worked not only a hardship and injustice to appellee, but would have been contrary to the practice and the law of this state.

Second. After the introduction of the notes in evidence appellant sought by cross-examination to go into and prove the consideration for which the notes were given. Upon objection by appellee to such testimony it was ruled out and an exception preserved to the ruling of the court in sustaining the objection. Appellant also sought to prove by appellant, as a defense to the notes, that the consideration for which they were given had failed, and to recoup damages sustained by such failure. This testimony was likewise eliminated upon the objection by appellee, to which ruling of the court appellant likewise preserved

an appropriate exception. It is insisted that because the common counts were a part of the declaration such proof was admissible under the plea of the general issue. Appellee, in introducing the notes in evidence, limited the offer of their introduction to the special counts, and under them in express terms they were so received by the court. It may be a mooted question whether, confining the offer of the notes in evidence to the special counts, without any proof of other indebtedness, did not operate to eliminate the common counts from the declaration and have the same or like force and effect as if a *nolle* had been taken as to them. But be that as it may, we do not regard the determination of the legal effect of such action necessary to our decision. Counsel for appellant, however, contend with much vigor and some plausibility that the defense attempted is in the nature of a recoupment, and that by the common law evidence sustaining such defense was admissible under the general issue where the common counts were found in the declaration. It is also contended that while a failure of consideration cannot be availed of as a defense under our statute without being specially pleaded, yet damages may be recouped and evidence of such damages received in the present condition of the pleadings, notwithstanding such recoupment partakes of the nature of a failure or partial failure of consideration; and on this point counsel say: "Certainly the mere fact that a proper case of recoupment may also, from another point of view, constitute a failure of consideration, ought not to induce the court to say that the statute has cut off the right to rely upon such recoupment, without pleading it generally, where such a right existed at common law before the statute was passed." As will appear later on in this opinion, we are unable to accede to counsel's contention on this point.

It is also urged that the decision of this court in *Dickinson v. Citizens National Bank*, 70 Ill. App. 403, is in conflict with and contrary to the ruling in *Hoer-*

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ner v. Giles, 53 *Ibid.* 540, and Wadhams v. Swan, 109 Ill. 46. Preliminary to a reference to cases *supra* it may be helpful to bear in mind that counsel for appellant admit in their brief that the two additional pleas, which the court declined to allow to be filed, are pleas of a total failure of consideration for which the notes were given, and the defense sought to be introduced under the plea of the general issue is without denial of the same character intended to be offered under the two rejected additional pleas.

The Dickinson case *supra* is as nearly on all fours with the case at bar as it is possible for one case to be with another. It was on two promissory notes with special counts declaring on each and the common counts. The plea was the general issue. The consideration for the notes was a sale of horses under a warranty. There was a breach of the warranty and a resulting failure of consideration. This was sought to be recouped against the claim under the notes. The testimony was rejected, and this court say, by Mr. Justice Adams, "The law is well settled by numerous adjudications, that proof of failure or want of consideration cannot be made under the general issue pleaded to a declaration containing a special count on a promissory note. *Rose v. Mortimer*, 17 Ill. 475; *Keith v. Mafit*, 38 Ill. 303; *Leggat v. Sands Brewing Co.*, 60 Ill. 158; *Waterman v. Clark et al.*, 76 Ill. 428; *Wilson v. King*, 83 Ill. 232; *Schroer et al. v. Wessell*, 89 Ill. 113; *Sheldon v. Lewis*, 97 Ill. 640. The decisions cited are in strict accord with section 9 of the statute entitled 'Negotiable Instruments,' which provides that when an action is brought upon a note failure of consideration, total or partial, may be pleaded. To permit of such proof under the general issue to a declaration containing a special count on the note would be virtually to repeal the statute which permits the filing of pleas of failure and partial failure of consideration."

We do not think *Hoerner v. Giles supra* involves the

point now under discussion. In the Hoerner case it does not appear that there was a special count declaring on the note in suit. All that appears to have been filed was the common counts, under which the notes were offered and admitted in evidence. A special plea of failure of consideration was filed, as also the general issue, and the court, in its instructions to the jury, limited the defense to the matters specially pleaded. While the court of review held that the defendant was not limited in recouping damages to the special plea, but that evidence supporting such recoupment was admissible under the general issue, the court say, "It follows that if the evidence in this record shows a proper case for the recoupment of damages, though the evidence on this point differs from the facts stated in the special plea," he might have availed of such defense under the general issue. The whole ruling was predicated on the showing of a proper case of recoupment.

The Hoerner case lacking special counts, the common counts being the only ones in the declaration, the defense of recoupment was admissible under the plea of the general issue. However, the Hoerner case is clearly distinguishable in its main feature from the condition which here obtains.

Wadhams v. Swan *supra* in its final analysis does not, except inferentially, involve the point here made. The decision of the case did not rest upon the exclusion of evidence of damages for land occupied by the railroad right-of-way which Wadhams claimed he was entitled to under his deed, the title to which he asserted had to that extent failed. The court held that he got all he bargained for. Wadhams filed, among the other pleas, a plea of total failure of consideration and the general issue, and in discussing this special plea the court say: "The proofs clearly do not sustain this statutory defense. We say statutory, for by the common law such a plea to a promissory note is not admissible at all. Our statute, however, with certain limita-

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tions, allows a defendant in such an action to interpose as a defense either a want of consideration or a total or partial failure of consideration. Now there are three distinct defenses, and to be made available they must be pleaded specially. The defendant is not permitted to set up one of these defenses in his plea and prove another under it. Recoupment, in the strict common law sense, is a mere reduction of the damages claimed by the plaintiff, by proof, under the general issue, of mitigating circumstances connected with or growing out of the transaction upon which the plaintiff's claim is based, showing that it would be contrary to equity and good conscience to suffer the plaintiff to recover the full amount of his claim."

In the case at bar the defense, strictly speaking, does not rest in recoupment as defined in case *supra*, but in a failure of consideration. While it is apparent that if a claim by way of recoupment might be proven under a plea of the general issue, it is the law that when such claim is in fact founded on a failure, wholly or partially, of consideration, the statute imperatively demands a special plea to that effect in order to admit proof of such a defense.

In *Keegan v. Kinnare*, 123 Ill. 280, the court, quoting from *Freeman's Notes to Van Epps v. Harrison*, 40 Am. Dec. 323, say: "(and we quote because, we think, accurately): 'In its modern application the foundation of recoupment is failure of consideration.'"

Wilson v. King, 83 Ill. 232, states the rule as to when it is necessary to plead a failure of consideration to notes declared upon specially. This case has not, so far as we can ascertain, been departed from by any other decision since delivered. The court say, after referring to section 9 of the Negotiable Instruments Act, "According to the provisions of this section, when the action is on such an instrument, to be available such a defense"—want of, entire or partial failure of consideration—"must be pleaded where the

declaration counts on such an instrument"—a promissory note—"the defense of course must be made by plea; or even where the declaration only contains the common counts and the plaintiff files a copy of the instrument therewith, and a written statement that no other evidence than the instrument of which a copy is filed will be offered on the trial, then a plea should be required."

The defense appellant attempted to interpose was a total failure of consideration for the two notes received in evidence under the two special counts. This defense was substantially that stated in the two additional pleas which the court refused to permit counsel to file. Such defense, in the state of the pleadings, was not admissible under the general issue. As appellant could only avail of such a defense by specially pleading it, the action of the court in refusing to admit it was consequently without error.

The judgment of the Superior Court is affirmed.

Affirmed.

J. M. Coats et al., Appellees, v. Chicago, Rock Island & Pacific Railway Company, Appellant.

Gen. No. 13,964.

1. **APPEALS AND ERRORS**—*effect of former decision.* All questions decided upon one appeal of a cause are conclusively determined with respect to such cause in the second appeal thereof.

2. **COMMON CARRIERS**—*what statute with respect to, not interstate commerce regulation.* The statute forbidding common carriers to limit their common law liability is not legislation with respect to interstate commerce in the constitutional sense. Even though it were, the failure of Congress to legislate, would permit the state to enact on this particular subject. However, while a statute may in its practical operation reach beyond the state, that fact alone does not constitute it an interference with interstate commerce.

3. **MEASURE OF DAMAGES**—*what element of, in action for failure to transport as per contract.* Interest, if the property is lost by failure to transport as per contract, may be awarded.

Coats v. C., R. I. & P. Ry. Co., 144 App. 81.

4. INSTRUCTIONS—upon what must be predicated. Each instruction must be predicated upon some evidence supporting its hypothesis.

Action on the case. Appeal from the Superior Court of Cook county; the Hon. SAMUEL C. STOUGH, Judge, presiding. Heard in this court at the October term, 1907. Affirmed upon remittitur. Opinion filed October 8, 1908.

M. L. BELL, for appellant; BENJAMIN S. CABLE, of counsel.

MAGRUDER, THOMPSON & CANDEE, for appellees.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This case was before this court on an appeal by the appellees from a judgment of the Superior Court against them, and our opinion on that appeal will be found in the 134 Ill. App. 217. Notwithstanding this fact, counsel for both parties have argued every question in the case, including those made on the former appeal and decided by the court. This they should not have done, because all the questions decided on the prior appeal are *res adjudicata* binding upon the parties as well as the court. All parties are concluded as to every question settled in that decision, none of which are open for further review. On a second appeal from the trial court all questions considered on the first appeal must be regarded as *res adjudicata* in the subsequent proceedings in the case, and the first decision is the law of the case on the second appeal. The cases supporting this rule are numerous and uniform. We cite the following as sufficient to support these propositions: Sweet v. West Chicago Park Comms., 177 Ill. 492; C. & A. v. Kelly, 182 *ibid*, 267; Keokuk Hamberg Bridge Co. v. The People, 185 *ibid*, 276; James v. I. C. R. R., 93 Ill. App. 294; Whitney v. Bolen, 56 *ibid*, 287; Christiansen v. Dunham Towing & Wrecking Co., 75 *ibid*, 267.

It was held in Wilson v. Carlinville Nat'l Bank,

87 *ibid*, 364, that under the provisions of the Appellate Court Act the previous opinion rendered in a cause is of binding authority in such cause, not only on the parties but upon the court.

We refer to our former decision in *Coats v. C., R. I. & P. Ry. Co.*, 134 Ill. App. 217, and adopt the same as our decision in this case so far as every question here presented was there decided, and will now proceed to dispose of those matters which were not before us on the former appeal and which have been added to the case on the second hearing in the trial court. The questions which we are now to decide relate exclusively to the facts developed by the last trial and the evidence supporting such facts. It is contended that the statute of Illinois forbidding a common carrier to limit its common law liability is a regulation of interstate commerce in violation of the Federal constitution, and error is assigned on the refusal of the court to give to the jury the fifth instruction requested by appellant.

We will decide the questions in the inverse order in which they are stated.

We think instruction 5 was calculated to mislead the jury upon the material question of liability. The suit was for unreasonable delay in transit through which the shippers lost the market for their potatoes. The facts constituting the right to recover were fairly stated in the second instruction given at the instance of appellees. By this instruction the jury were told that the damages recoverable was such as shown by the evidence to have proximately resulted from delay in transportation, while in the instruction complained of the liability of appellant is limited to deterioration of the potatoes during transit, not resulting from natural decay, but due to detention in transit in excess of a reasonable time. The instruction might have been refused, as it probably was, because there is no evidence in the record of the actual condition of the potatoes at the time

they should have arrived at their destination in the exercise of due diligence by the carrier.

The Illinois statute forbidding common carriers to limit their common law liability is in no sense an interference with interstate commerce. This statute comes within the definition laid down in *Peik v. Chicago, etc., Ry. Co.*, 94 U. S. 164, where it is said: "As to the effect of the statute as a regulation of interstate commerce, the law is confined to state commerce, or such interstate commerce as directly affects the people of Wisconsin. Until congress acts in reference to the relations of this company to interstate commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally they may reach beyond the state. But certainly until congress undertakes to legislate for those who are without the state, Wisconsin may provide for those within, even though it may indirectly affect those without."

The failure of congress to legislate upon this subject relieves the state statute from the charge of being in conflict with the Federal law. While the statute may in its practical operation reach beyond the state, that fact alone does not constitute it an interference with interstate commerce. *Osborne v. Mobile*, 16 Wall. 482. It may not be amiss to observe that if the constitutionality of this statute is involved in this appeal, this tribunal has no jurisdiction to decide that question.

The evidence establishes as a fact that appellant did not carry the potatoes the subject-matter of this suit, within a reasonable time, as the law required. A reasonable time was between four and six days; the actual time occupied in transit ranged from twenty-one to forty days. The evidence is amply sufficient to establish a right of recovery for such unreasonable delay in transporting the potatoes to their point of destination, and the verdict of the jury is, as to that right, sus-

tained by the evidence. We think it was the province of the jury to allow interest as an element of damage in their assessment of damages. Appellees, if entitled to recover, had been deprived of the value of the potatoes, lost to them by the negligence of appellant, for more than seventeen years, and the loss of interest upon that amount was an element of damage suffered by appellees. *Seymour v. Fueling Company*, 103 Ill. App. 631; *I. C. R. R. Co. v. Foulks*, 191 Ill. 57; *Nevin v. Pullman Co.*, 106 Ill. 222.

We regard the assessment of damages, under the evidence, as excessive and not warranted by it. In the light of the testimony of dealers upon the Philadelphia potato market, which was the destination and place of intended sale of the potatoes, as to the value of the potatoes, we do not think the jury were justified in disregarding such testimony, as they seem to have done, and giving full credence to the evidence of Coats, Hatton and Foulkes, whose estimates were the highest value at which the best potatoes were sold at the top of a short market before the arrival of potatoes from the West, which apparently glutted the market, and while not detracting from the force of the testimony of Coats, Hatton and Foulkes, it cannot be gainsaid but that the testimony of the witnesses of appellant, who had been actively engaged in business in the Philadelphia potato market, was entitled to much weight with the jury and ought not to have been ignored by them. They had the better advantage of familiarity with local conditions and market prices, while Coats, Hatton and Foulkes had neither of them done business in the Philadelphia market before the shipment of the potatoes in dispute. -

There was a sharp conflict in the evidence as to the value of the potatoes. Coats, Hatton and Foulkes, appellees' witnesses, put the price at from \$1 to \$1.25 per bushel. On the other hand, appellant's witnesses, Darmon and Brown, both dealers on the Philadelphia po-

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tato market, put the price of potatoes during the months of April and May, at from thirty cents to eighty-five cents per bushel. There was also much testimony that the potatoes were of an inferior kind and quality. Appellees' proof proceeded upon the assumption that the potatoes were of the highest grade and of the best quality. All the evidence considered as to the values, we think the jury failed to appreciate that a conscientious weighing of the evidence should have led them to a medium course between the sworn maximum and minimum prices. There were 7,862½ bushels of potatoes lost to appellees. The verdict of \$16,000 is based upon a price in excess of \$1 per bushel, with added interest. This we have concluded is excessive and not sustained by an impartial interpretation of the evidence. This is the only material error injuriously affecting appellant's rights found in the record. As a corrective, we shall require from appellees a *remittitur* of \$4,000 from the judgment, to be entered within ten days, as a condition of the affirmance of the judgment. Upon such *remittitur* being made within the time aforesaid, the judgment of the Superior Court will be affirmed; otherwise the judgment will be reversed and the cause remanded for a new trial.

Affirmed on remittitur \$4,000; otherwise reversed and remanded.

Remittitur filed and judgment affirmed October 15, 1908.

Marguerite Favar, Appellee, v. Riverview Park, Appellant.

Gen. No. 13,969.

1. DAMAGES—*what evidence not competent to establish.* Evidence of the value of an amusement park "privilege" estimated by guessing at or stipulating upon future uncertain profits, is incompetent. Elements or facts which support the estimate must be given in order to render it competent.

2. DAMAGES—*when loss of future profits should not be awarded.* Loss of future profits of a purely speculative nature cannot properly be included in an award of damages.

3. MEASURE OF DAMAGES—*in action for failure to give possession of leased premises.* The measure of damages for failure to give possession of leased premises is the difference between the actual rental value and the rent reserved to be paid by the lease. The same rule applies to a farm, a dwelling house, a hotel or business premises. The rule is varied in the case of an established business, in which case the measure of damages would be the difference between the rent and the value of the lessee's business, which would necessarily include an allowance for profits.

Assumpsit. Appeal from the County Court of Cook county; the Hon. WM L. DEWOLF, Judge, presiding. Heard in this court at the October term, 1907. Reversed and remanded. Opinion filed October 8, 1908.

JOSEPH H. FITCH, for appellant.

EDWARD R. LITZINGER, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

The conclusion reached by the court necessitates a new trial of the cause; consequently the questions of fact involved rest for their solution with the jury before whom the cause may be next tried, or the judge of the County Court, if a trial by jury should be waived. We shall therefore only refer to such portions of the evidence as from its nature involve questions of law.

The basis of this action is the non-performance upon the part of appellant of its undertaking in the following writing:

“CHICAGO, June 18, 1906.

The privilege for the season of 1906 is granted to Marguerite Favar of St. Augustine, Florida, now of Chicago, to install at her own expense the Princess Corena Show with an appropriate wood front and tent back on the South Pike line next east of Photograph Gallery, and to include the vacant space in the rear of the place hereby granted and in the rear of the present booth space reserved to the occupants of said booths

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between the Photograph Gallery and Bratwurst Restaurant, providing the sum of one hundred dollars, \$100, is paid before possession is taken, and thereafter 25 per cent of the gross receipts, the usual salary of cashier to be selected by the Park company and electricity at cost to the Park.

(Signed) WM. M. JOHNSON, Secretary."

On the day of the date of this writing the U. S. Tent & Awning Company sent its check for account of appellee for \$100 to appellant, which was afterwards returned when appellant discovered that it was unable to deliver to appellee the plot of ground in the writing mentioned. This \$100 was paid, it is contended, not for the contract, or as rent, or as a consideration for the making of the contract by appellant, but for the purpose, as appellant contends, and the proof indicates, to compensate the then occupant of the plot for removing therefrom his unprofitable paraphernalia, termed a "Razzle Dazzle," so that appellee might instal thereon her contemplated "Princess Corena" show.

Appellant did not comply with the terms of its contract for the reason, so it claims, that it could not procure the removal of the so-called "Razzle Dazzle." Appellee commenced this suit in an effort to recover damages which she claims she suffered consequent upon appellant's failure to carry out its part of said contract. Appellee contends that the writing in question is a "privilege," and proceeded to prove damages upon the theory of the value of such privilege; while appellant contends that the writing is in the nature of a lease of the plot of ground therein described, and that the percentage of receipts fixed as compensation for its use is rent therefor, and that damages for a breach must be measured upon the principles applicable to a failure to give possession under a covenant so to do usually found in leases of realty. We do not regard it as necessarily affecting the rights of the parties or our decision of the controversy, whichever of these two

methods are adopted in admeasuring the damages to be awarded, for under either theory the measure of damages must be the same.

Following the delivery of the contract appellee caused to be ordered material consisting of canvas and lumber sufficient to construct a tent 28x50 with wooden flooring, stage, etc., to cost \$1,065, and enough canvas was cut the evening of the same day from which the tent could be constructed. Notwithstanding appellant notified appellee that possession of the land could not be given, work was continued on tent construction for two days, and then it appears from appellee's proof, the canvas was thrown "on the scrap pile;" but why this canvas should have been discarded in view of the fact that two days subsequent to its abandonment appellee secured a similar plot of land at San Souci Park in which she installed a canvas tent of nearly the same dimensions and constructed of the same kind of canvas in shape and color, the evidence does not disclose. Appellee engaged for the show contemplated to be given on appellant's premises four young women performers at a weekly salary of \$20 each, but these engagements were canceled without expense or other loss to appellee. Appellee also bought 2,000 descriptive posters costing \$20. It may be assumed that the cost of these posters was a loss to appellee. The amount of recovery, however, was predicated upon the value of the contract as a "privilege" and for profits estimated that appellee would have received had appellant let her into possession of the plot of land set out in the contract. Appellee testified that the value of the "privilege" was \$800. Her testimony was purely conjectural and not supported by any fact from which the jury could compute the amount of damages actually sustained. Her testimony on this point was her conclusion only. On objection the same was properly stricken from the record. Appellee's witness Schwartz testified that the "privilege" was worth \$2,000, but failed to state any

fact or element from which his conclusion as to value could be verified. He thought it was worth that amount, but his estimate was purely speculative. Appellant's motion to exclude Schwartz's testimony from the record should have been allowed, and in failing to do so the court committed reversible error. The instruction given to the jury as to the measure of damages was erroneous. The business intended to be conducted by appellee was a new venture and the profits, if any, which might be realized uncertain and purely speculative. In this situation appellee cannot recover on account of expected profits, as there is nothing tangible in the evidence to prove that a profit would have been made. *Hair v. Barnes*, 26 Ill. App. 580.

The measure of damages for failure to give possession of leased premises is the difference between the actual rental value and the rent reserved to be paid by the lease. The same rule applies to a farm, a dwelling house, a hotel or business premises. The rule is varied in the case of an established business, in which case the measure of damages would be the difference between the rent and the value of the lessee's business, which would necessarily include an allowance for profits. *Hexter v. Knox*, 63 N. Y. 561; *Papovsky v. Munkwitz*, 68 Mo. 322.

But if the business were a new one, there could be no recovery for profits, and in that case the measure of damages would be restricted to those recoverable under the rule first recited. The profits which appellee might have made had she installed her show in appellant's park are purely speculative. The rule for assessment of damages is thus stated in 1 *Sutherland on Damages*, p. 111:

"The cardinal rule in relation to the damages to be compensated on the breach of a contract that the plaintiff must establish the *quantum* of his loss by evidence from which the jury will be able to establish the extent of his injury, will exclude all such elements

of injury as are incapable of being ascertained by the usual rules of evidence to a reasonable degree of certainty. Instances of such uncertain damages are profits expected from a whaling voyage, and the gains which depend in a great measure upon chance; they are too purely speculative to be capable of entering into compensation for non-performance of a contract."

The profits to be made from a show of the character of the one appellee intended to exhibit in appellant's park are just as uncertain as those to be expected from a whaling voyage, for both depend very largely for their success upon the weather being fair or foul. As said in *Lewis v. Atlas Co.*, 61 Mo. 534: "In fact, the success of such enterprise depends on so many contingencies that we can conceive of no means of making the necessary proof on which to found a verdict. No rule for such ascertainment can be predicated. Past success in similar enterprises will not do. Conditions may not always remain the same." This reasoning applies with equal force to appellee's claim for anticipated profits as well as her attempt to fix upon a value of the contract as a "privilege."

Appellee is entitled, in no event, to recover more than the actual damages sustained by her by reason of appellant's breach of its contract with her, if it shall be found to have been guilty of a breach thereof, and such damage must be proven with a reasonable degree of certainty and devoid of all speculative features and free from conjecture.

We think the instruction asked by appellant should have been given, as it contains all the essential elements of damage which appellee is in any event entitled to recover. Its refusal was error prejudicial to appellant.

The judgment of the County Court is reversed and the cause remanded for a new trial conformable to the views here expressed.

Reversed and remanded.

Northwestern Fuel Co. v. Western Fuel Co., 144 App. 92.

**Northwestern Fuel Company, Appellee, v. Western
Fuel Company, Appellant.**

Gen. No. 13,971.

1. *PRACTICE—how sufficiency of plaintiff's evidence to sustain action should be raised.* In order to preserve for review the question as to the sufficiency of the plaintiff's evidence, standing alone, to sustain the action, the defendant must move the court at the conclusion of the plaintiff's evidence for a finding in favor of the defendant.

2. *PRACTICE—when propositions of law properly refused.* Propositions of law are properly refused which are alien to the law as affecting the facts deducible from the proofs.

3. *EVIDENCE—burden of proof to establish right to discount.* A defense to the effect that the defendant is entitled to a discount is affirmative and the burden to establish the same is upon the defendant.

4. *ACCOUNT STATED—what evidence tends to establish.* The receipt of itemized statements and the retention thereof for months without objection tends to establish an account stated.

Assumpsit. Appeal from the Municipal Court of Chicago; the Hon. JOHN C. SCOVEL, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed October 8, 1908.

HARVEY STRICKLER, for appellant.

TENNEY, COFFEEN, HARDING & SHERMAN, for appellee; JAMES H. WILKERSON, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This action is *indebitatus assumpsit*, and the issues rest on the common counts with a bill of particulars filed by plaintiff and the general issue filed by defendant, with a plea of tender of \$288.91 before suit and a replication denying tender. The trial was before the learned trial judge, the parties having waived a jury. The claim was for coal sold and delivered. The defense did not rest in a dispute over the amount of coal delivered, but upon two claims: first, that on 3,784

tons of coal defendant was entitled to a deduction of forty cents per ton and to a further discount of five per cent upon the purchase price of 5,968 tons of coal. The finding was in favor of plaintiff in the sum of \$2,136.79, upon which finding judgment was entered.

There is no dispute between the parties as to the prices at which coal was billed to defendant. The only item of dispute between them, aside from the subsequent claim for deduction on certain coal of forty cents per ton and five per cent discount on other coal, was a freight item of \$35.65, and this item was conceded by plaintiff to defendant and credited on the amount of the original claim.

Defendant urges as a complete defense to plaintiff's claim, that under the pleadings plaintiff must prevail, if at all, on the theory of an account stated; that the evidence in chief is insufficient to support the claim upon the theory of an account stated between the parties. We are not inclined to accord our assent to this contention as justified from the probative force of such evidence. Statements were rendered by plaintiff and received by defendant for every shipment of coal. These statements contained the price at which the coal was billed; they were retained by defendant without objection or complaint as to price charged. The receipt of many of these statements was acknowledged.

It is apparent to us that the evidence in chief, standing uncontradicted, is sufficient to sustain the judgment upon the theory of an account stated between the parties for the coal billed to them in the several accounts rendered. Still, if defendant was desirous of availing of the now claimed defects in this evidence, in the trial court and on appeal, it should have moved, at the time when plaintiff rested its case, for a finding in its favor. Having failed to do so, the question which was before the trial court and is now before us is: All the evidence considered, is plaintiff entitled to recover for the coal sold and delivered at the prices at which it was billed to defendant?

Without reciting the evidence, which we have carefully perused and weighed, we are clearly of the opinion that it sustains the right of the plaintiff to payment for the coal at the prices charged. We are not limited in our investigation to the determination of the single proposition, as claimed by defendant, as to whether the evidence is sufficient to warrant a recovery on an account stated, but on the contrary, it is our duty to determine whether the evidence in the record is of that character which entitles the plaintiff, on the merits of the case so established, to recover the amount charged for the coal delivered. The claim of defendant to an allowance of forty cents per ton on some of the coal and to a discount of five per cent. on all of it, is a substantive affirmative defense, which to be effectual the law cast upon the defendant the burden of maintaining by a preponderance of the evidence.

We agree with the trial court that the evidence falls far short of preponderating in defendant's favor on this contention. The greater weight of the evidence is to the effect that defendant was to pay for the March and April coal deliveries the price fixed for April coal. This is further substantiated from the fact that the March and April coal was so charged upon the statements received by defendant from plaintiff, and that no objection was made at the time, and that not for several months after their receipt was the counter claim to deduction and discount made. On the contrary, defendant made written acknowledgment of the orders covering the March and April deliveries, which included the price on the basis of the price fixed for April coal. And, furthermore, defendant at the request of plaintiff sent a statement of coal received, with the price attached, being the same at which the coal was billed to it for March and April, and thereafter subsequent deliveries at the same price were acknowledged without complaint or protest. A statement in evidence rendered by plaintiff to defendant as late as January 31, 1907, bears an indorsement

in the handwriting of defendant's bookkeeper, "W. F. Co. bal. \$2,110.91," which was the amount claimed on this statement, less the conceded freight item of \$35.57. We regard this, in the light of the other proof, as highly significant—the force of which defendant cannot escape.

The claim of defendant for a discount of five per cent, it has equally failed to substantiate by its proof.

The finding of the trial judge, in a submitted cause, is as to the facts entitled to the same weight as the verdict of a jury, and the court of review cannot reverse such finding unless it clearly appears that the finding of fact is manifestly contrary to the probative force of the evidence. *Baumgartner v. Bradt*, 207 Ill. 345; *Burgett v. Osborne*, 172 *ibid*, 227.

Because other items than those in controversy were upon the statements rendered, in no way detracted from their constituting, as to such controverted items, an account stated, in view of no objection being made to any of such items for many months after the receipt of the statements containing them. In such circumstances a defendant will be held to have acquiesced in them. *Green v. Smith*, 21 Ill. App. 198.

The propositions of law tendered by defendant were properly refused. They were alien to the law as affecting the facts deducible from the proofs. *Pratt v. Davis*, 224 Ill. 300.

Upon the theory that the plaintiff did not establish between the parties, by its testimony in chief, an account stated, which, so far from conceding we deny, yet plaintiff on all the proof in the record is entitled to the judgment it obtained under the doctrine announced in *Sandoval v. Main*, 23 Ill. App. 395, where the court say:

"The action of *indebitatus assumpsit* is in the nature of an equitable one; and if the plaintiff should fail to sustain his particular theory of the case, yet if the testimony of the defendant should show, although introduced upon a different view of the case, in con-

Blume v. Bereda Manufacturing Co., 144 App. 96.

nection with the other testimony in the case, that the defendant was indebted to the plaintiff upon any of the counts in the declaration, it would be the duty of the court to give judgment accordingly without regard to the source of the evidence from which the real rights of the parties were made manifest."

The finding and judgment of the trial court does justice between the parties, and finding no error in the record the judgment of the Municipal Court is affirmed.

Affirmed.

George P. Blume, Appellee, v. Bereda Manufacturing Company, Appellant.

Gen. No. 13,975.

ATTACHMENT—*what fraudulent conveyance of property.* The execution and delivery of a chattel mortgage (with the understanding that it shall not be recorded) covering personal property in the possession of the mortgagor, is fraudulent and constitutes ground for attachment.

Assumpsit. Appeal from the Superior Court of Cook county; the Hon. ALBERT C. BARNES, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed October 8, 1908.

W. A. HAMILTON, for appellant.

FREDERICK A. BROWN, for appellee; WM. R. T. EWEN, JR., of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Plaintiff sued defendant as the indorsee and holder of its promissory note for \$250, dated December 21, 1903, and payable twelve months after date, to the order of John L. Van Dolah, with interest at five per cent per annum. This note was indorsed and delivered to plaintiff by the payee for a valuable consideration before maturity.

The common counts and a special count declaring on the note constituted the declaration, to which defendant pleaded failure of consideration at the time of the assignment and delivery of the note to plaintiff, averring such failure was known to plaintiff at the time he received the note from the payee by indorsement, like failure as to all but \$50, and a set-off against the payee in the note to the amount of \$500. Thereafter a writ of attachment was sued out in aid of the suit in assumpsit, under a claim that defendant had within two years fraudulently conveyed or assigned its effects, or a part thereof, so as to hinder and delay its creditors, and during the same time had concealed or disposed of its property, or a part thereof, so as to hinder and delay its creditors, and was about fraudulently to conceal, assign and otherwise dispose of its property or effects, or a part thereof, so as to hinder and delay its creditors. The attachment writ was levied upon personal property and defendant released the levy by giving a forthcoming bond. Defendant joined issue on the attachment by filing a plea traversing the material averments of the affidavit under which the writ was sued out.

The cause was tried before the court without a jury, and the finding of the court upon which judgment was entered assessed plaintiff's damages in the sum of \$292.42, the amount due upon the note for principal and interest, and found the issues in the attachment in favor of plaintiff; from which finding and judgment defendant seeks this review of the record.

It appears from the proofs that one John L. Van Dolah owned a secret process for the manufacture of a compound useful, so it is said, for cleaning wall paper, fresco walls, etc., called the "Excelsior Elastic Wall Cleaner;" that plaintiff was interested in the formula embodying such secret process and the business conducted by Van Dolah under the name of "Excelsior Manufacturing Co." Plaintiff's interest was, he contends, limited to the advancement of money to

Van Dolah which Van Dolah used in this business enterprise. The note in question was given by defendant to Van Dolah as part consideration for imparting to it the ingredients of the secret process, also for an assignment of the good will of Van Dolah and all his interest in the business conducted by him under the name of "Excelsior Manufacturing Co.," he to furnish a release from plaintiff of any interest which plaintiff might have in such secret process.

Van Dolah fulfilled his part of the agreement, including the furnishing of plaintiff's release of any interest he might have in the said secret process. In a settlement between plaintiff and Van Dolah the note in question was, long prior to its maturity, assigned and delivered to plaintiff. It is now insisted that plaintiff was a partner with Van Dolah in the business of wall paper, etc., cleaner; that the formula was worthless, because the compound from it would not keep, and that it was sticky and otherwise unusable for cleaning purposes, and that as a consequence of this condition the consideration of the note failed; that plaintiff is chargeable with knowledge of these facts, and is not to be regarded as an innocent holder for value before maturity, and that the same defenses are available to defendant against plaintiff, with like effect as if the note were still in the hands of Van Dolah, the payee.

There is some conflict in the evidence, but we are satisfied that the probative force of it preponderates in favor of plaintiff, that plaintiff was not a partner with Van Dolah in the business carried on in the name of the "Excelsior Manufacturing Co.," but that from the time the note came to his possession he was an innocent holder for a valuable consideration. This being the conclusion to which the trial court arrived and to which we have also come, the defenses interposed, however available as against Van Dolah, are impotent as against plaintiff.

It is not a matter of serious controversy that de-

fendant executed and delivered a chattel mortgage to one Frieda Brehme conveying the stock of goods, among other things kept in defendant's store for sale at retail, with the understanding that the chattel mortgage should not be recorded. This understanding the evidence shows was carried out. During the time the debt secured by the chattel mortgage remained unpaid, there was no visible change in the business of defendant. Goods were sold from the stock the same after the mortgage was given as before, with the knowledge and consent of the mortgagee.

That such a mortgage is fraudulent and void as against creditors and subsequent purchasers for value, if any, of the mortgaged property, is the uniform and uninterrupted conclusion of the courts of review of this state. To the same effect are the decisions of the federal courts and the rules laid down by text writers upon this subject. Such a lien is fraudulent because it is secret and lures the uninformed and innocent creditor to give and part with his property, when he would not do so had he knowledge of the lien. Such liens are a menace to business and the mercantile world, and will not be tolerated by the courts where the interests of innocent third parties intervene. The authorities are numerous; we content ourselves by citing a few: *Haas v. Sternbach*, 156 Ill. 44; *Forest v. Tinkham*, 29 *ibid.* 141; *Frank v. Armour*, 50 *ibid.* 444; *Barchard v. Kohn*, 157 *ibid.* 519; *Dunning v. Mead*, 90 *ibid.* 376; *McNeill v. Plows*, 83 Ill. App. 186; sec. 247 *Cobby on Chattel Mortgages*; sec. 234 *Wait on Fraudulent Conveyances*; *Ferguson v. Johnson*, 36 Fed. Rep. 134.

The finding and judgment of the trial court on both the assumpsit and attachment issues are sustained by the proofs and sanctioned by the law of the state, consequently the judgment of the Superior Court must be and it is affirmed.

Affirmed.

Fitzgerald v. Chicago & Erie R. R. Co., 144 App. 100.

BROWN, J., concurring: I concur in this decision, but as to the attachment issue I do so on the ground only that from the facts of this case reasonable grounds to believe in a fraudulent intent in fact appear.

I am not prepared to hold that an unrecorded chattel mortgage without change of possession is in itself a sufficient ground for attachment under the statute, although it may be constructively or legally fraudulent as to creditors and subsequent purchasers for value.

John H. Fitzgerald, Appellee, v. Chicago & Erie Railroad Company, Appellant.

Gen. No. 13,990.

VERDICT—*when set aside as against the evidence.* A verdict manifestly contrary to the probative force of the evidence will be set aside on appeal.

Action in case for personal injuries. Appeal from the Superior Court of Cook county; the Hon. WILLIAM H. MCSURELY, Judge, presiding. Heard in this court at the October term, 1907. Reversed and remanded. Opinion filed October 8, 1908.

W. O. JOHNSON and GALE & JOHNSON, for appellant.

COBURN & CASE, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an appeal from a judgment of \$1,990, entered on the verdict of a jury as compensation for personal injuries suffered by appellee as a result of the claimed negligence of appellant.

Appellee's contention is that while a passenger upon the train of appellant, and after having paid his fare, he was wantonly thrown by the servants of appellant from the train while it was in motion, as a result of which he was injured.

In the conclusion to which we have arrived upon the facts in evidence, it becomes unnecessary for us to discuss in this opinion any of the questions raised by counsel other than whether the verdict and judgment are supported by the evidence, or so manifestly contrary to its probative force that it is our duty to reverse the judgment of the trial court.

Appellee's narrative of the occurrence is, that while standing upon the platform of the train of appellant as it was passing in a southerly direction on Thirty-seventh street, the conductor and brakeman came out upon the platform, assaulted him and threw him off the train about the time it reached Fortieth street, and while the train was proceeding south at a rapid rate of speed.

But one witness, James Dowling, testified in an attempt to substantiate the evidence of appellee. However, his testimony utterly fails to do so on the crucial point. Dowling saw the accident, but he did not see any one throw appellee off the car. He testified he saw other men at the car door, but none on the platform. It stands to reason that if appellee had been thrown off the platform by the conductor and brakeman, as he claims, these servants must have been on the platform of the car when they did such a dastardly act. If they were, Dowling could not help but see them. On cross-examination Dowling testified that appellee stepped off the side of the car, walked right out on the platform, stepped down off the step and got rolled. So far from Dowling's testimony lending any corroboration to appellee's claim of being thrown off the car by the conductor and brakeman of appellant, it discredits it. This evidence is not confirmative; it is flat contradiction.

Arrayed against this testimony is that of the conductor and brakeman, who on every essential and material point contradict the narrative of the occurrence by appellee. They both deny having seen appellee at all until he had fallen from the train, and then only

on the train stopping in response to the alarm given following the occurrence. These witnesses positively and unequivocally testify that they saw appellee for the first time after he suffered the injuries consequent upon his falling from the train. Another of appellant's witnesses, McCall, who saw the accident from the Thirty-ninth street station of the Chicago & Eastern Illinois Railroad, testified that when he first saw appellee he was standing between two coaches and fell off while the train was going, without slacking its speed, at Fortieth street. This witness does say that from where he stood it was impossible for him to tell whether appellee was pushed off, jumped off, or fell off, yet he is positive in his statement that no persons were on the platform at the time the train passed him at Thirty-ninth street.

Dr. Parschie testified that he attended appellee at the Provident Hospital where he arrived for treatment, and that appellee told him the train was going too fast when he attempted to get off, and that he fell on his head, and that the accident resulted from his own fault. A written statement signed by appellee was also received in evidence. Its statements were substantially in accord with Dr. Parschie's evidence, including the statement that the train was going too fast when he attempted to get off, that he fell on his head, and that the accident was his own fault.

It would seem that comment as to the probative force of the foregoing evidence is superfluous. The burden of proving that the accident was the result of appellant's conductor and brakeman forcing appellee from the train, as charged in the declaration, rested on appellee, and he failed to maintain the burden which the law so imposed. The countervailing proof is overwhelming in contradiction of appellee's contention. Courts of review should give great weight to the finding of a jury, and ought not to disturb such finding unless not sustained by a clear preponderance of the evidence or manifestly contrary to its probative

force. But where there is a conflict in the evidence, and such evidence clearly preponderates in favor of the party against whom the verdict is rendered, then such verdict is in law manifestly against the weight of the evidence, and in such a condition it is the duty of a court of review to reverse the judgment entered thereon. *Bradley v. Palmer*, 193 Ill. 15; *Peaslee v. Glass*, 61 Ill. 94.

It is the province and duty of this court to see to it that no judgment be allowed to stand upon the verdict of a jury not resting upon a preponderance of the evidence, but which is plainly the result of the whim or prejudice of the jury rendering it.

Appellee failed to establish his claim, counted upon in his declaration, by a preponderance of the evidence, and the verdict rendered is contrary to its probative force.

The judgment of the Superior Court is reversed and the cause remanded for a new trial in conformity with the views here expressed.

Reversed and remanded.

Catherine Duffy, Appellee, v. George Frankenberg et al., Appellants.

Gen. No. 13,996.

1. CONSPIRACY—*when, to obtain judgment, not actionable.* A judgment not void for want of jurisdiction cannot be collaterally attacked and while such a judgment remains in full force an action charging conspiracy to obtain it does not lie.

2. CONSPIRACY—*when action at law for, does not lie.* A civil action cannot be maintained for a mere conspiracy. Damages of an actual and not punitive character must flow from the conspiracy before the action can be maintained. When actual damage is proven to have been suffered, then punitive damages may also be allowed according to the particular aggravating character of the conspiracy demonstrated by the proofs.

3. DAMAGES—*when punitive, will not be awarded.* In the absence

Duffy v. Frankenberg, 144 App. 103.

of proof of actual damages, the assessment of punitive damages is not justified.

4. SERVICE OF PROCESS—*when return cannot be impeached.* Return of service cannot be impeached by the unsupported testimony of the defendant in the writ, or collaterally by any number of witnesses.

Trespass on the case. Appeal from the Superior Court of Cook county; the Hon. ALBERT C. BARNES, Judge, presiding. Heard in this court at the October term, 1907. Reversed. Opinion filed October 8, 1908.

WALTER A. LANTZ, for appellants.

GEORGE E. GORMAN, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an action of trespass on the case brought by the plaintiff against the defendants, George Frankenberg, John R. McDonnell, P. B. Tierney and William J. Luddy, charging them with conspiring together to injure plaintiff by obtaining her property to satisfy a judgment fraudulently obtained against her. Luddy was not served with process and did not appear, so that the cause proceeded to trial against Frankenberg, McDonnell and Tierney, before the court and a jury. The court instructed the jury to find McDonnell not guilty, which they did, and at the same time returned a verdict of guilty against Frankenberg and Tierney, assessing plaintiff's damages at \$1,500. After overruling motions for new trial and in arrest of judgment, the court entered judgment upon the verdict. Defendants made the usual objections and preserved the customary exceptions to the actions of the court culminating in the judgment, and prayed for, obtained and prosecute this appeal seeking a reversal thereof.

The material facts, briefly stated, are about as follows: Frankenberg was a loaner of money, mostly to impecunious and unthrifty salaried people. The son of the plaintiff, James P. Duffy, belonged to this

class, and in consequence got into the clutches of Frankenberg when he borrowed of him \$30, giving his notes for the aggregate sum of \$33. These notes were indorsed by one Curley, and young Duffy reciprocated the favor by indorsing Curley's note to Frankenberg, Curley likewise being of the impecunious class who borrowed from Frankenberg. James P. Duffy after borrowing the \$30 removed to New York, and as he was a man of no financial substance, Frankenberg stood in imminent danger of losing the money which he loaned him. Confronted with this threatened loss, he seems to have sought a way out of it by endeavoring to get Duffy's mother, the plaintiff, who was a person of some fortune, to pay her son's debt to him. He testifies that Mrs. Duffy called upon him to ascertain the amount of her son's indebtedness, and on being informed that it was \$33, promised to pay it. As Mrs. Duffy did not pay her son's debt, Frankenberg brought suit before the defendant McDonnell, a Cook county justice of the peace, whose court was situated in a remote part of Chicago. Tierney was the constable who served the summons, although Mrs. Duffy denies both the promise to pay her son's debt and the service upon her of summons by Tierney in the Frankenberg suit. While she admits that the constable was at her house and informed her in relation to the pendency of the suit, yet she denies that he served her with process, but on the contrary states that after she had denied her promise to pay and all liability to Tierney, he left, saying, in effect, that there was no case against her. The summons, however, was returned served, and after a continuance, which Frankenberg claimed was granted at the request of Mrs. Duffy by telephone, a judgment by default was taken on her non-appearance at the time to which the cause was continued, and Frankenberg then swore out an immediate execution upon the grounds permitted by statute. After judgment was entered, and on July 10, 1904, plaintiff left Chicago for New York, from which port four days

thereafter she took steamer for Europe to be gone two months or more. Luddy, a constable, had the execution and called at plaintiff's residence to demand payment after she had left Chicago. A daughter of Mrs. Duffy, Mrs. Coffey, was in possession of her mother's residence, and to her Luddy said that he had come to levy on her mother's furniture under the McDonnell execution. He then had a wagon and sundry men with him for the purpose, as he stated, of taking away Mrs. Duffy's furniture if the amount due on the execution was not paid. After consultation with her sister, Mrs. Kerwick, one of them paid the amount demanded, \$39 and some cents, number not appearing from either Mrs. Coffey's or Mrs. Kerwick's evidence.

It cannot be controverted on the proof of plaintiff found in this record, that the attack upon the judgment of Frankenberg v. Catherine Duffy obtained in the justice of the peace court of McDonnell is collateral and not direct. Judgments not void for want of jurisdiction are not open to collateral attack in the manner attempted in this case, and no recovery of damages can be had for a conspiracy to obtain such a judgment while the same remains in full force and unreversed. As applied to the case at bar, before this action of conspiracy can be maintained, the judgment before Justice of the Peace McDonnell must in a direct proceeding be overcome, vacated and adjudged to be reversed as voidable on account of the fact, if such be the fact, that Tierney's return of service upon the summons is false. In its present situation the presumptions of the law are in favor of the validity of the judgment, and such presumptions continue until overcome by an adjudication impeaching it in a direct proceeding attacking it.

A judgment rendered by a court having jurisdiction of the parties and the subject-matter, unless reversed or annulled in some proper proceeding, is not open to contradiction or impeachment in respect to its validity, verity or binding effect, by parties or privies in any

collateral action or proceeding. *Harris v. Leter*, 80 Ill. 307; *Kern v. Strasberger*, 71 *ibid.* 303; *Kanorowski v. The People*, 113 Ill. App. 468.

A judgment entered by default, the court having jurisdiction, as in the case at bar, is as conclusive against collateral attack or impeachment as a judgment in any other form. *French v. Baker*, 21 Ill. App. 432.

The evidence fails to disclose any actual damage suffered by plaintiff flowing from the conspiracies alleged in the declaration. She paid no money or other thing of value to satisfy the demands of Constable Luddy for payment of the execution upon the judgment obtained in the court of McDonnell, J. P. Neither did she suffer any actual damage by the levying of the execution upon her property, for no levy was made or attempted. The amount due on the execution was paid by the daughters of plaintiff at a time when she was beyond seas. The payment was not made to release a levy, but to forestall one being made. It is therefore clear that the assessment of damages is all of a punitive nature. Without proof of actual damage, vindictive or punitive damages cannot be allowed. This is the trend of all the modern decisions on this subject. *Martin v. Leslie*, 93 Ill. App. 44.

A civil action cannot be maintained for a mere conspiracy. Damages of an actual and not punitive character must flow from the conspiracy before the action can be maintained. When actual damage is proven to have been suffered, then punitive damages may also be allowed according to the particular aggravating character of the conspiracy demonstrated by the proofs. *Doremus v. Hennessy*, 62 Ill. App. 391.

There is no evidence in this record tending to show that any of the defendants but Frankenberg had any knowledge of the transaction between the latter and the Duffys. McDonnell had none, so far as the record shows, when he issued the summons. Tierney had no

information regarding the matter at the time the summons was delivered to him for service, although he learned Mrs. Duffy's version of the matter at the time he claimed he served the summons upon her. Luddy, who had the execution for collection, had no knowledge of the facts of the transaction between the parties to the execution, so far as we can gather from the record, prior to or at the time he proceeded to collect the amount of the execution in the manner usual in such cases, sanctioned by the statute. There being no proof in the record tending in the slightest degree to establish the charge that the defendants conspired together to procure an unlawful or fraudulent judgment against the plaintiff, the case falls at its very threshold.

That the defendant Frankenberg attempted to obtain an undue advantage of plaintiff in suing her for the debt of her son, which, as he claims, she had promised verbally to pay, and which Frankenberg must be presumed to know was not enforceable, as being a promise to pay the debt of another, and barred by the Statute of Frauds because it was not in writing, appears from his own evidence. That Tierney served the summons upon Mrs. Duffy, we are much inclined to believe from all the evidence of the parties at the time Tierney admittedly attended at Mrs. Duffy's house for that purpose, for while Tierney, as is natural with men of his Celtic blood, was gracious to the ladies and careful of their feelings and anxious to spare them as much annoyance as possible compatible with the discharge of his official duties, he undoubtedly was sufficiently careful, in as unostentatious and inoffensive manner as possible, to make legal service of the summons on Mrs. Duffy before he left her house. He has solemnly so certified in his written return of the writ, and such return cannot be impeached by the unsupported testimony of the defendant in that writ, or collaterally by any number of witnesses.

Our conclusion is that the plaintiff cannot maintain

her action in its present form, and that the judgment is not only manifestly contrary to the weight of the evidence, but finds no support in it. The judgment of the Superior Court is therefore reversed, without remanding the cause.

Reversed.

**In the Matter of the Estate of Nellie German, deceased.
Myron W. Whittemore, Appellant, v. William Coleman
et al., Appellees.**

Gen. No. 14,009.

1. *LACHES—when heirs not guilty of.* The time for heirs to object to the acts and doings of an administrator is when such an administrator renders his final account; the delay intervening the time for filing such account does not constitute laches.

2. *ADMINISTRATION OF ESTATES—when allowance of claim does not justify payment by administrator.* While an administrator will be protected, even as against the heirs, in the payment of a claim duly allowed and ordered paid in due course of administration, though it subsequently develops that such claim was not proper to be allowed for payment, yet this rule is restricted to such claims allowed and paid in good faith and without fraudulent connivance of an administrator having knowledge at the time of payment that such claim should not have been allowed.

3. *ADMINISTRATION OF ESTATES—when attorney's fees not allowed administrator.* Upon final settlement attorney's fees will not be allowed to the administrator who is himself an attorney, nor another claiming to have acted as attorney for such administrator, in the absence of proof of services rendered.

4. *ADMINISTRATION OF ESTATES—when compensation denied administrator.* Compensation should be denied to an administrator who wrongfully permits a waste or illegal diversion of estate assets.

5. *JUDGMENTS—when court of probate may vacate.* The Probate Court has jurisdiction to vacate a judgment rendered upon a claim at any time during the administration of the estate upon and after the discovery of fraud in virtue of which it was caused to be entered.

6. *JURISDICTION—of courts of probate in administration of estates.* Courts exercising probate jurisdiction in this state possess all the powers of a court of equity in the settlement of final accounts of any of its administrative officers, and may vacate judgments or any other order fraudulently or collusively procured to be entered.

Whittemore v. Coleman, 144 App. 109.

Objections to administrator's report. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed October 8, 1908.

W. H. RICHARDSON, for appellant.

WILLIAMS, LAWRENCE, WELSH & GREEN, ASHCRAFT & ASHCRAFT and ANDREW L. WINTERS, for appellees; J. D. WELSH and RAYMOND M. ASHCRAFT, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

The descent of the property involved in this estate embraced two generations of illegitimates, but with these peculiar and infrequent conditions, notwithstanding they have been provocative of considerable litigation, we are not concerned on this appeal. The questions before us are encompassed within the final account of appellant as administrator of the estate of Nellie German, deceased, one of the illegitimates, and the objections filed thereto by those persons who have been solemnly adjudged by the Probate Court to be her heirs at law, the correctness of which adjudication, while once disturbed at *nisi prius*, has been twice affirmed on review and is now settled beyond controversy. *Coleman v. Swick*, 120 Ill. App. 381; *Swick v. Coleman*, 218 Ill. 33.

The evidence given and received in support of the account as rendered and that of the objectors against it, constitute all the matters involved in this review. It remains for this court to determine whether, under these proofs and the law governing and controlling it, the Probate and Circuit Courts of Cook county have rendered correct judgments.

At the threshold of our review we are confronted with a record which discloses that the questions of fact have been decided by both the Probate and Circuit Courts contrary to the contentions of the appellant. In the absence of any error of law it is incum-

bent upon us to affirm the decree of the Circuit Court unless we can say that such decree is manifestly contrary to the greater weight of the evidence. It is the settled law that the finding of fact by the trial court shall upon review have the same force and effect as the verdict of a jury. A careful perusal and a thoughtful weighing of the evidence have resulted in bringing our minds to the conclusion that the proof is ample to sustain the findings reached by the Probate and Circuit Courts.

The errors assigned and urged upon us in argument resolve themselves into the following: That the administrator's account should not have been surcharged with the following items: The amount paid claim of Jennie Swick; the amount charged as child's award; the credits asked for administrator's and solicitor's fees.

The claim of laches made by appellant as against appellees as heirs at law is not well taken. It is the theory of the law that an administrator in a measure represents in his official capacity all parties interested in the assets of the estate, both creditors and heirs, during the period of administration. Until the time comes for the rendition of the final account of the administrator, the law does not require the heirs to take notice of the doings of the administrator. Their right to object is at the time when such administrator, through his final account, discloses his actions and dealings with the estate. The burden is upon him to maintain by proof the items entering into his account, as being just and proper, whenever the heirs, after notice of its filing, shall in apt time file objections thereto. The final account was filed March 10, 1906. The objections of appellees were filed thereto and a final order adjudicating the matters involved in such objections was entered on April 10, 1906. From the foregoing it is clear that appellees acted promptly in objecting when the time for so doing arrived, and consequently are not chargeable with laches.

While an administrator will be protected, even against the heirs, in the payment of a claim duly allowed and ordered paid in due course of administration, though it subsequently develops that such claim was not proper to be allowed for payment, yet this rule is restricted to such claims allowed and paid in good faith and without fraudulent connivance of an administrator having knowledge at the time of payment that such claim should not have been allowed. It is likewise the law that the Probate Court is without jurisdiction to vacate a judgment at a term subsequent to the one at which it was rendered, except for fraud, and then at any time during the administration of the estate after the discovery of the fraud in virtue of which it was caused to be entered. But appellant argues that if he was guilty of fraud in the allowance and payment of the Swick claim, such conduct could only be impeached in a court of equity, and cites *Anderson v. Anderson*, 178 Ill. 160, to sustain such contention. But the bill in the *Anderson* case was filed after the settlement of the estate, although the same matters sought to be impeached in the equity suit had been unsuccessfully urged in the estate matter in the County Court.

Courts exercising probate jurisdiction in this state possess all the powers of a court of equity in the settlement of final accounts of any of its administrative officers, and may vacate judgments or any other order fraudulently or collusively procured to be entered. *Schlink v. Maxton*, 153 Ill. 447.

It is not open to doubt but that the Probate Court has jurisdiction to do all things necessary or essential to the end that justice may be done between the heirs and the administrator upon the settlement of a final account, and full equitable powers are vested in the Probate Court for the accomplishment of that purpose. Wherever the right has been challenged in this state, the courts have conceded the possession of the

power. *In re* Corrington, 124 Ill. 362; Whitney v. Peddicord, 63 *ibid.* 249.

The case of Marshall v. Coleman, 187 Ill. 556, is very instructive on every important and controlling feature of the case at bar. It is conclusive both on fact and legal principle, and is as near in all its pertinent features to the present case as one case ordinarily can be to another. Both the Probate and Circuit Courts proceeded in accordance with its rulings, and their conclusions ought not to be disturbed if the facts in the record support such conclusions.

The Probate Court in the first instance and the Circuit Court on appeal recast appellant's final account by eliminating therefrom the following items:

First. The amount paid Jennie Swick on her claim proved and allowed by the Probate Court	\$1078.13
Second. Amount credited as payment to himself as guardian of Myrtle J. German for minor's award.....	550.00
Third. Amount credited as paid Arthur W. Fulton for legal services.....	600.00
Fourth: Amount retained by appellant for Administrator's commission.....	568.00

The evidence conclusively demonstrates to our minds that appellant sought fraudulently to make an unlawful personal profit and gain to himself from the assets of the estate he was charged in law prudently to conserve, and out of which he could make no profit to himself except such fees for his services, permitted by law, to be fixed by the court.

The testimony of the widow of Dr. Gibbs, that appellant and her husband stated that after they had satisfied Jennie Swick with a home, they would divide the estate between them, is indicative of an intention of appellant to unlawfully acquire for himself a part of the estate entrusted to his keeping and to divert the remainder to a person not entitled to any of it. When

Jennie Swick presented her claim for the support of Myrtle J. German in a sum less than \$100, appellant, in pursuance of the purpose so formed to illegally acquire for himself a part of the estate, induced Jennie Swick to swell the amount of her claim to \$1,078.13, and in fraud of the rights of the heirs and contrary to his duty, procured the claim for the latter amount to be allowed by the Probate Court. If the judge of the Probate Court had been apprised of the facts in relation to that claim, it would not have been allowed for the sum demanded. The claim in its increased amount was allowed with the written consent of appellant. There was clearly fraud and collusion on the part of appellant in securing such allowance, and notwithstanding there was a formal order, made by the court on him to pay it, nevertheless he must be held to have known that if at the time of the application for that order he had informed the court of the truth as to the way in which the claim was concocted, and of the proper amount in fact due Jennie Swick, the court would not have ordered appellant to pay it. Appellant was guilty of fraud in suggesting an increase of the amount of the claim and in consenting to its allowance for the increased amount, and likewise guilty of fraudulent conniving in its payment at the time he paid it. For although the claim had been fraudulently allowed, it could not have been paid but for appellant's unlawfully conniving to have the order entered directing him to pay it. Such order so fraudulently procured will not protect appellant in making the payment. He must be held to the responsibility which the law casts upon him consequent upon these fraudulent actions.

The retention by appellant of \$550 out of the estate for minor's award as guardian of the estate of Myrtle J. German was a gross fraud. In the first place, the judge of the Probate Court was imposed upon when the allowance of a minor's award was made. Myrtle J. German died September 22, 1898; the award was

not allowed until May 29, 1899, and charged in the final account as of the day of its allowance. While it is the fact that the present heirs would not suffer any loss—with the exception of a small sum for commissions to appellant—by reason of the allowance and payment of the minor's award, still that fact does not relieve appellant from the consequences of his fraudulently imposing upon the Probate Court in procuring the award to be made. However, his conduct in this matter becomes significant as one of a number of actions, all unlawful, as showing an intent on appellant's part to impose upon the Probate Court in procuring orders and allowances which would not have been permitted had appellant disclosed the true condition of affairs to the court. This fraudulent conduct was intended to result in his personal profit out of the assets of the estate. Appellant is an attorney and, lacking proof to the contrary, it will be presumed that he performed all services of a legal nature in the estate of which he was guardian and administrator. The abstract discloses that Arthur W. Fulton was an attorney occupying the same office as appellant. There is no evidence that Fulton ever rendered any legal service for appellant in his official capacity in connection with the German estate. The disallowance of the charge of \$600 in the final account, for legal services stated to have been rendered by Fulton, was, in view of the absence of proof that any such service was rendered, proper.

Compensation, within the statutory rate, is allowed administrators for the faithful discharge of their duties. When it appears, as in this case, that the administrator has fraudulently diverted the assets of the estate and, with third parties, sought to deprive those entitled to share in the estate of a considerable portion of their inheritance, it is but the exercise of a sound discretion reposed in Probate Courts to deny a defaulting administrator, or an administrator who wrongfully permits a waste or illegal diversion of

Glass v. Chicago Union Traction Co., 144 App. 116.

estate assets, any compensation or remuneration whatever. *Askew v. Hudgens*, 99 Ill. 468. Appellant also unduly, and we think unnecessarily, delayed making his final account to the Probate Court. Letters were granted to appellant nearly eight years before he filed this account. There is nothing in the record excusing such delay, nor is any reason urged in argument in an attempt to justify it.

The Probate Court was right in the exercise of its judicial discretion in denying appellant the allowance requested for services as administrator, and in refusing to make any allowance at all, and the Circuit Court did not err in following the same ruling and disallowing the claim made for administrator's services. *In re Estate of George Wincox*, 186 Ill. 445.

The decree of the Circuit Court is without error, and it is therefore affirmed.

Affirmed.

Sara N. Glass, Appellant, v. Chicago Union Traction Company et al., Appellees.

Gen. No. 14,022.

1. **PERSONAL INJURIES**—*upon what recovery must be predicated.* In actions for the recovery of damages for personal injuries resulting from the negligence of the defendant, the right to recover is limited to the acts of negligence charged to be the cause of the injury suffered.

2. **VARIANCE**—*what constitutes fatal.* Proof that the car "began to run away quick" is not identical to starting and moving "with a sudden jerk" and such a variance is fatal.

3. **APPEALS AND ERRORS**—*when rulings upon evidence and instructions will not reverse.* If a peremptory instruction would have been justified in favor of the successful party the action of the trial court in giving erroneous instructions and in admitting incompetent evidence will not reverse.

Action in case for personal injuries. Appeal from the Circuit Court of Cook county; the HON. CHARLES M. WALKER, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed October 8, 1908.

BRADY & LEVY, for appellant; C. STUART BEATTIE, of counsel.

JOHN A. ROSE and FRANK L. KRIETE, for appellees; W. W. GURLEY, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an action on the case for personal injuries suffered by plaintiff while a passenger upon a car operated by the defendant, Chicago Union Traction Company, as the result of negligence alleged to be imputable to defendants. The trial before court and jury resulted in a verdict and judgment for the defendants. Plaintiff seeks a review of the record and asks a reversal of the judgment.

The declaration charges that defendants were negligent in that on the arrival of its car at Twelfth street and Lawndale avenue, and after the car had stopped for the purpose of permitting passengers to alight therefrom, and while plaintiff was in the exercise of due care and caution for her own safety and in the act of alighting from the car, the defendant, by its servants in charge of the car, negligently, wrongfully and carelessly started and moved the car with a sudden and violent jerk, by reason whereof the plaintiff was thrown to the ground and was severely injured in a manner particularly set forth.

It is elementary that in actions for the recovery of damages for personal injuries resulting from the negligence of a defendant, the right to recover is limited to the acts of negligence charged to be the cause of the injury suffered. Such proof cannot in any case be dispensed with. Without such proof there can be no recovery.

The record shows an entire absence of proof of the particular negligence charged as resulting in the accident and injury to plaintiff. Nor is there any proof of acts which constitute negligence from which the

accident to plaintiff can be charged. The allegation of negligence is that the car started and moved "with a sudden and violent jerk." We have scanned the record in vain for evidence supporting this charge. As to the occurrence the witness Wilkins testified: "I was looking out of the window and I saw the car come, going west on Twelfth street, and it stopped for a second or two, a short while, and then threw off, or somebody fell off. The car stopped and then went on again. That is all I saw of it." The testimony of plaintiff on this point, found in the abstract, is as follows: "When I tried to get off I got one foot on the step, the car begins to run away quick. I got throwed off the car."

Miller testified: "I saw the car come to a standstill and then it started again. Then the lady was thrown off the car. * * * She fell from the rear platform." On cross-examination Miller further testified: "When the car passed me I was on the sidewalk. The car did not stop, it kept right on going."

This constitutes all the testimony covering the movements of the car and of plaintiff disclosed by the abstract. It will be observed that all of this evidence, with every reasonable inference which can be indulged from it, is insufficient to sustain the averment that the car started and moved with a sudden and violent jerk. The variance between the allegation of negligence and the proof is fatal to a recovery. It is patent that evidence that the car "began to run away quick," is not tantamount to starting and moving "with a sudden jerk." No negligence can be predicated on a car's beginning to "run away quick." It may have so run smoothly and without any violent motion or jerk, for aught that appears to the contrary. To "run away quick" is no more definite expression than to run "very fast," and as said in *Chicago Union Traction Co. v. Duckstein*, 136 Ill. App. 389, so we say now, for it is equally applicable: "The expression 'very fast' used by the witness is vague, indefinite and meaning-

less. Unaccompanied by other and more definite evidence, it does not tend to prove negligence."

The instructions to the jury on the crucial question, proof of the negligence charged, were in accord with precedent, for as said in *Traction Co. v. Rarup*, decided in this court November 28, 1904, and not reported, "The burden of proof is not upon the defendant to show how the plaintiff came to fall. If the preponderance of the evidence does not show that he fell by reason of the car being negligently and suddenly started and moved in manner and form as charged in the declaration or some count thereof, then the plaintiff has failed to make out his case under the declaration in this case."

Instruction 13, given at the instance of defendants, is open to much of the criticism made by plaintiff's counsel, and the testimony of Moriarity, appellees' investigator, was inadmissible, and the motion of appellant to exclude it should have been granted. But neither of these errors in any way affected the result to plaintiff's prejudice. The trial judge would have been justified in granting defendants' motion, made at the close of plaintiff's case, to instruct the jury to find a verdict in defendants' favor, for as the case then stood a verdict for plaintiff could not have been maintained.

The judgment of the Circuit Court is without reversible error, and it is affirmed.

Affirmed.

Kathryn E. Reifschneider, Appellee, v. Walter E. Reifschneider, Appellant.

Gen. Nos. 14,040 and 14,041.

1. **MARRIAGE**—*when valid under laws of Indiana.* A marriage between minors of ages sufficient to enable them to contract, is valid under the laws of Indiana where made pursuant to license duly issued and performed by an officer vested with power to solemnize

Relfschneider v. Relfschneider, 144 App. 119.

the same and followed by a return showing the solemnization of the marriage as required by law.

2. MARRIAGE—*what agreements do not affect validity of.* An agreement to keep secret the fact of marriage for a specified period does not affect its validity; nor (the marriage having been followed by copulation) does an agreement that the same shall not take effect for a stipulated period, affect its immediately fixing the status of the parties.

3. MARRIAGE—*effect of, under laws of Indiana, if made without issuance of license.* A marriage contracted in Indiana is not void if not solemnized pursuant to a license if the parties thereto believed that the marriage at the time of its making was legal.

4. SEPARATE MAINTENANCE—*when wife entitled to allowance for.* The marriage being established, it is the duty of the husband to support his wife in accordance with his condition in life and if he fails or refuses to do so and the wife in consequence thereof is living separate and apart from him without her fault, she is entitled to an allowance for her reasonable support and maintenance to be awarded to her in a proceeding for that purpose.

5. SEPARATE MAINTENANCE—*what not defense to proceeding for.* The fact that the complainant in a proceeding for separate maintenance resides in another state does not affect her right to maintain the same in the county of this state in which the defendant resides.

6. SEPARATE MAINTENANCE—*what may be considered in fixing alimony.* In fixing the alimony to be awarded in a separate maintenance proceeding, the court may not only take into consideration the present means of the defendant but his prospective inheritance as fixed by the terms of the will of a deceased ancestor.

Separate maintenance. Appeal from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed October 8, 1908.

JOHN GIBSON HALE, for appellant.

WILLIAM H. EMBRICH and ROBERT P. BATES, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

These two appeals were consolidated for hearing and determination pursuant to an order duly entered upon the agreement of the parties. They both arise out of the same proceeding, viz: a statutory bill for

separate maintenance. The appeals will therefore be considered and determined as a unit in this opinion, although separate orders will be entered in each case to carry into effect the judgment which will be here pronounced. The appeal in 14041 is from an order committing appellant for a contempt of court in not paying appellee alimony *pendente lite*, and the appeal in 14040 is from the final order in the cause decreeing appellee a separate maintenance with suitable allowance for support, solicitor's fees and costs.

These appeals call for our determination of three questions:

First, are the parties, Walter E. and Kathryn E. Reifschneider, husband and wife?

Second, if they are, was Mrs. Reifschneider, at the time she filed her bill for separate maintenance, living separate and apart from her husband without her fault, within the meaning of the statute providing for an allowance for wives so living?

Third, are the allowances made by the chancellor suitable and necessary for the wife and within the financial ability of the husband to pay?

The parties were married at Hammond in the State of Indiana on August 12, 1904. Both the contracting parties were of immature years, one said to be a little more and the other a little less than nineteen years of age. These young persons became acquainted at the Austin High School, and were lovers. Reifschneider was anxious that the marriage ceremony should be performed, although he was not able to or desirous of assuming the full responsibility which such relationship would impose upon him both by law and custom. He was, however, anxious to secure appellee for his wife, fearing, as he expressed it, that if he waited until she was older she would not feel the same way about it. It was then agreed between them that they should be married at Hammond, Indiana, and that the fact of such marriage should be kept secret for two years. In pursuance of this understanding the parties pro-

ceeded to Hammond, where Reifschneider procured a marriage license from the clerk of the Circuit Court of Lake county, Indiana, on the 13th day of August, 1904, and on the same day as appears by the return upon the license, the parties were joined in marriage by T. M. C. Hembroff, a judge of the City Court of Hammond. The marriage is further evidenced by a certificate under the hand of the officiating judge. All of the foregoing was made to appear by a duly exemplified copy of the various documents referred to pursuant to the act of congress in relation to the exemplification and authentication of records. The marriage ceremony was followed by copulation, although each of the contracting parties returned to their respective homes without apprising their families of the new relationship existing between them. Appellee, however, did make known to some persons the fact that she was married and was the wife of appellant. The parties continued to reside with their respective families, who were kept in ignorance of the marriage relationship until the following February, when the mother of appellant discovered from the marriage certificate the fact of her son's marriage to appellee. Appellant's mother then did what a good woman with natural instincts would have been expected to do under these circumstances. She counseled the young people to live together and proffered her help in furnishing a flat for that purpose. Appellee was quite willing to do so, and expressed herself as being willing to live with appellant as his wife. But appellant doggedly refused to live with appellee as his wife, and paid no heed to the advice or admonishings of his mother to take his wife and go to housekeeping with her. Appellee was working at the time of this conversation and offered to keep at work and furnish her earnings toward paying household expenses. Appellant at this time made no denial of his marriage to appellee, but flatly refused to either live with her or support her. Subsequently the father of appellee died, and her

mother, having predeceased him, she was thereby left an orphan, and as her father left no estate, she was without support. She then went to Pittsburgh, Pennsylvania, and lived in the family of her aunt. Appellant did not contribute to the support of his wife during the time she lived in Pittsburgh. On April 24, 1905, appellant filed in the Superior Court of Cook county a bill for the annulment of his marriage with appellee, to which appellee interposed a demurrer. Upon the hearing of the demurrer it was held to have been well taken, and the bill was dismissed.

The following sections from the R. S. of Indiana were offered and received in evidence without objection:

“Sec. 7289. Marriage is declared to be a civil contract, into which males of the age of eighteen years and females of the age of sixteen years * * * are capable of entering.

“Sec. 7290. Marriages may be solemnized by ministers of the gospel and priests of every church throughout the State, judges of courts of record, justices of the peace, and mayors of cities within their respective counties. * * *

“Sec. 7292. Before any person, except members of the Society of Friends, shall be joined in marriage, they shall produce a license from the Clerk of the Circuit Court of the County in which the female resides, directed to any person empowered by law to solemnize marriages, and authorizing him to join together the persons therein named as husband and wife.

“Sec. 7295. No marriage shall be void or voidable for the want of license, or other formality required by law, if either of the parties thereto believed it to be a legal marriage at the time.

“Sec. 7296. Every person who shall solemnize any marriage by virtue of the provisions of this act shall within three months thereafter file a certificate thereof

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in the clerk's office of the County in which such marriage was solemnized, which certificate shall by such clerk be recorded, together with such license, and such record or a copy thereof shall be presumptive evidence of the facts therein stated." R. S. Stat. Indiana, 1901. Vol. 2, City Court.

"Sec. 3671. Such judge shall provide a seal for such court, which shall contain on the face the words, 'City Court of — Indiana;' (filling the blank with the name of the city and county). A description of such seal, together with an impression thereof, shall be spread on the records of said court.

"Sec. 3672. City Courts shall be courts of record.
* * *

"Sec. 3674. * * * Such judge shall have full authority to administer oaths, to take and certify acknowledgments of deeds and other instruments, to solemnize marriages, and to give all necessary certificates for the authentication of the records and proceedings in said court."

The legality of this marriage must be adjudged from the laws of Indiana, the place where the marriage contract was entered into, and whose law officer performed the marriage ceremony. The uncertain and inconsistent evidence of appellant cannot be received to contradict the solemn record of a sister state. All of the statutory requirements essential to a valid marriage under the statutes of Indiana the record discloses were substantially complied with. The marriage license was first issued, the parties were then married by an officer of the law, vested with power to perform the marriage ceremony. That officer made due return of the solemnization of the marriage upon the license, and the license with such return on it was then filed with the clerk of Lake county. The officer then issued a marriage certificate which the mother of appellant afterwards found in his possession. The marriage was valid by the laws of Indiana.

It is therefore valid and binding upon the parties in whatever other territorial jurisdiction they may live. This marriage, performed in Indiana, agreeable to its laws, was afterwards consummated in Illinois. The parties are husband and wife and have been such since August 13, 1904. But appellant contends that the agreement to keep the marriage secret for two years invalidates the ceremony and annuls the marriage. That this is an erroneous view of the law is too plain for discussion. Again, it is urged that the agreement was that the marriage should not go into effect for two years, and such an agreement, upon authority, vitiates the marriage. Were we willing so to concede, it would be an irrefutable argument to say that such rule is not applicable here because it is not denied that the marriage was consummated by copulation soon after the marriage ceremony was performed. From any angle from which these facts may be viewed, the consummation of the marriage, following so soon after the marriage ceremony, completed the contract of marriage and makes it binding upon both the parties. The testimony proves conclusively that the copulation which followed the ceremony was in the faith and belief by both parties that they were lawfully married to each other.

Section 7295 of the Indiana statute is significant in its bearing upon appellant's contention that no license was issued, for the other facts as to the performance of the marriage ceremony by an officer having authority to join parties in marriage being admitted, this section would be sufficient to cure the omission to procure a license, if such license had not been procured. This section reads "No marriage shall be void or voidable for want of license or other formality required by law if either of the parties thereto believe it to be a legal marriage at the time." We are impressed with the belief, from the evidence in the record, that appellant as well as appellee not only believed but had no shadow of doubt in their minds but

that they were lawfully married when they returned from Hammond to Chicago, on August 13, 1904, and in the faith of that belief assumed the relationship to each other of husband and wife. Neither can the marriage be avoided upon the contention that appellant was not of sufficient age to legally contract a binding marriage, for by section 7289 *supra* it is provided that a marriage may be entered into between "males of the age of eighteen years and females of the age of sixteen years." Both the parties' ages exceed that of the minimum so fixed by the statute.

Second. The marriage being established, it is the duty of appellant to support appellee as his wife in accordance with his condition in life, and if he fails or refuses to do so, and the wife in consequence thereof is living separate and apart from him, without her fault, she is entitled to an allowance for her reasonable support and maintenance, to be awarded to her in a proceeding for that purpose, in conformity to chapter 68 R. S.

The evidence conclusively proves that appellee, though willing, has had no opportunity to live with appellant in the marital relation. He refused to heed the appeals of his mother or to accept the financial aid which she proffered to enable him to live with his wife in a flat. He also refused to live with her in the home of her sister, Mrs. Lewis, until other arrangements could be made. While he claimed he could not support a wife on the money he was earning, yet he refused to live with her even after she overcame that difficulty by agreeing to continue working in a position from which she was receiving \$30 a month. Strong circumstances of his unwillingness to live with his wife arise from the facts that he repudiated the validity of the marriage and filed a bill in an attempt to annul it, and that notwithstanding the death of her father left her bereft of parental protection, he did not go to her or contribute anything to her support. Appellee has maintained the averment of her bill that

she is living separate and apart from appellant without her fault. But it is claimed that because appellee, after the death of her father, moved to Pittsburgh, residing there with an aunt, that therefor she is a non-resident and not entitled to maintain this suit in the forum of this jurisdiction. It is elementary law that the residence of the wife follows that of her husband. *Davis v. Davis*, 30 Ill. 180.

This proceeding is purely statutory and must be governed entirely under the authority conferred by the statute, and this provides, in section 23, that "proceedings under this act shall be instituted in the county where the husband resides." Appellant is a resident of Cook county. In the forum of that jurisdiction the proceeding was properly cognizable.

Third. The marriage being established, as also the fact that appellee is living separate and apart from appellant, her husband, without her fault, the question remaining for determination is whether the allowance for suit money and support are justified from the proofs. It is evident from the record that appellant, so far, has not developed the capacity to earn much money, his ability in this line extending to not more than \$15 a week. He is not possessed of any money. But he has admittedly an interest in property, subject to a life estate in his mother, under the will of Mathew Gottfried, the deceased maternal grandfather of appellant. The estate in the hands of the trustees of the Gottfried estate, in which appellant is the remainder man, exceeds \$150,000 in value.

In view of this prospective inheritance, the allowances made both for support and solicitor's fee and suit money must be regarded as moderate and in every way reasonable, and in accordance with the condition in life of appellant. He has property from which he can realize money, if he chooses, to support his wife. This the law requires him to do.

Temporary alimony, appellant claims, should not have been allowed before the final hearing, as the mar-

riage of the parties was denied by appellant. While it is true that, until the relationship of husband and wife is either established by proof or admitted in the pleadings, it is not the rule to make any allowance for temporary alimony or suit money, in this case it was made to appear from facts in the record, that by the ruling of the Superior Court in the suit to annul the marriage, the facts set forth in the bill, upon which appellant sued for an annulment of the marriage, were insufficient to warrant its annulment, and further, that the facts set forth in the answer of appellant to the bill before us, were likewise insufficient to support the defense that the parties did not bear to each other the relation of husband and wife.

Before entering the initial order for alimony *pendente lite*, the chancellor had before him indisputable evidence of the lawfulness of the marriage of the Reifschneiders, and since that time the correctness of the court's conclusion has been substantiated in a hearing upon the merits, resulting in the final decree involved in this appeal.

Finally, appellant cannot advantage of his own refusal to perform the contract of marriage solemnly entered into by him with appellee, according to the forms of the law of Indiana. Appellee had a right to demand that appellant live with her in accord with the obligation and custom of that relationship, and his refusal to do so after her demand can be neither excused nor condoned.

A strange doctrine indeed it would be if a man, protesting his love for a woman, proffers marriage and, gaining her consent, the parties proceed to the marriage ceremony, in accord with the laws of a sister state, such marriage being followed by cohabitation, that because there was a compact between them to keep such marriage secret from their families for a time, the man can, at his own whim and caprice, annul the marriage by being recreant to his duty in refusing to live with and support his wife. Such a doctrine

would be monstrous and result in undermining the social fabric in its most sacred relation of life.

The order of May 8, 1907, holding appellant in contempt of court for non-payment of temporary alimony, is affirmed.

The final decree of the Circuit Court, awarding appellee separate maintenance with allowances for support and solicitor's fees, and ordering appellant also to pay the costs, being without error, is affirmed.

Affirmed.

The People of the State of Illinois, Defendant in Error, v. Abner Smith et al., Plaintiffs in Error.

Gen. No. 13,861.

1. CONSPIRACY—*what equivalent to charging, as at common law.* An indictment for conspiracy which concludes "contrary to the law" is tantamount to charging a conspiracy at common law.

2. CONSPIRACY—*appropriate averments of indictment charging.* Those guilty of conspiring to obtain money by false pretenses may be indicted either under the statute or at common law, or both.

3. CONSPIRACY—*what gravamen of offense of, to obtain money by false pretenses.* The gravamen of the offense is the conspiracy to do the unlawful act. It is not the false pretenses which constitute the crime, but the conspiring together with the design to make such false pretenses.

4. CONSPIRACY—*what indictment charging, to obtain money by false pretenses need not allege.* An indictment charging a conspiracy to obtain money by false pretenses need not set out or show in what the false pretenses consist.

5. CONSPIRACY—*what sufficient to sustain verdict in prosecution for.* One good count is sufficient to sustain a verdict and conviction in a prosecution for conspiracy.

6. CONSPIRACY—*what indictment charging, to obtain money by false pretenses need not allege.* An indictment charging conspiracy to obtain money by false pretenses need not allege that the conspiracy was formed against any individual. Such an indictment may properly charge conspiracy against the public generally.

7. CONSPIRACY—*when allegations of indictment charging, sufficient.* An indictment for conspiracy must state a date but the exact date need not be given, and the proof, where the allegation of date

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is under a *videlicet*, may show any date within the period of the Statute of Limitations.

8. CONSPIRACY—*what not description of the offense of*. The names of the persons with whom the indicted defendant conspired are not descriptive of the offense.

9. PLEADING—*when indictment sufficiently technical*. An indictment charging conspiracy to obtain money by false pretenses is technically sufficient if it charges the offense in the language of the statute.

10. CRIMINAL LAW—*what presumptions not indulged upon appeal in favor of convicted defendant*. Notwithstanding no presumptions will be indulged against the defendant who has not testified in his own behalf, yet no such presumptions will be indulged in his favor which are not justified by the evidence adduced by the state where such evidence stands without countervailing proof.

11. VARIANCE—*when objection for comes too late*. In a criminal as well as in a civil case, an objection of variance comes too late when first raised on appeal.

12. EVIDENCE—*when objection to competency of witness comes too late*. An objection that a witness called by the state is disqualified, comes too late when first raised on appeal.

13. EVIDENCE—*when declaration of co-conspirator competent*. The declarations of a conspirator who is not prosecuted are equally admissible with those of one under indictment in the prosecution.

14. EVIDENCE—*when books not property of defendants accused of crime and therefore competent against them*. Books kept by an incorporated bank are not the individual property of the officers thereof who were charged as individuals with conspiracy, and such books are therefore competent to be used upon the prosecution.

15. PRACTICE—*when bill of particulars need not be ordered*. It is not error in a criminal case to deny a bill of particulars where the indictment in itself gives sufficient information of the crime charged, and there is nothing in the proof which shows that the defendants were taken by surprise, or were in any way prejudiced, because of lack of knowledge of the particular facts upon which the state depended for a conviction.

16. TRIAL—*when remarks of trial judge not ground for reversal*. A remark by the trial judge to the effect that a defendant might have taken the stand and made denial of a particular statement of a witness, does not affect the other defendants, and they have no right to complain with respect thereto.

Criminal prosecution for conspiracy. Error to the Criminal Court of Cook County; the HON. MERRITT W. PINCKNEY, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed July 6, 1908. Rehearing denied and opinion modified and refiled October 15, 1908.

Statement by the Court. Plaintiffs in error, Abner Smith and Gustav F. Sorrow, with Jerome V. Pierce and Frank E. Creelman, were jointly indicted for conspiracy to obtain money and other property by false pretenses. Smith, Sorrow and Pierce were convicted, and Creelman acquitted, by the jury on a trial under the indictment. Pierce was fined \$500, which he paid. Smith and Sorrow were fined \$1,000 each, and in addition were sent to the penitentiary under an indeterminate sentence. In an effort to reverse the judgment of conviction Smith and Sorrow sue out this writ of error.

The indictment consists of nine counts; the first and eighth conclude "contrary to the statute," and the others conclude "contrary to the law," which is tantamount to charging a conspiracy at common law.

The first two counts, after stating the proceedings relating to the organization of the bank, the obtaining of the charter, and the opening of the bank for business, allege in substance that fifteen directors, naming them, were elected; that Abner Smith was elected president, and Gustav F. Sorrow vice-president, and Jerome V. Pierce, cashier, who with their co-defendant Frank E. Creelman were also directors; that when the bank opened for business it had 200 stockholders, 1,500 depositors, 200 customers, and 200 creditors, many of whom were ignorant of the affairs of the bank; and that the defendants represented to subscribers for stock that the bank was to have a capital of \$250,000; that the stock was to be sold for \$200 a share, \$100 of which was to constitute a surplus of \$250,000; and that the defendants, devising and fraudulently intending to acquire and get into their hands and possession the moneys, goods and property of the public by false and fraudulent and dishonest means, on the 14th day of February, 1906, wrongfully, wickedly, fraudulently, feloniously and unlawfully did conspire to get and obtain, knowingly and designedly, and by false pretenses, the moneys, goods and property of

the public, with the intent to cheat and defraud and injure them.

The third count, after the inducement, charges that said Abner Smith, then and there being president and director of said Bank of America, and Jerome V. Pierce and Gustav F. Sorrow, whilst then and there being directors and vice-president and cashier respectively of said bank, and Frank E. Creelman, then and there being a director of said bank, well knowing the premises in that count before mentioned, and well knowing the bank's affairs to be in a dangerous condition and approaching insolvency and then insolvent, and that the stock and shares were unsafe, and might be ruinous to the owners thereof, and well knowing that the depositors in said bank might lose their deposits, and fraudulently devising and intending to acquire and get into their hands and possession the moneys, goods and property of the stockholders, depositors, creditors and customers of said bank, and such other persons who might believe certain false representations and pretenses thereafter named to be true, and become stockholders, depositors, creditors and customers of said bank, by fraudulent and dishonest means, on the 14th day of February, A. D. 1906, at Chicago, in said county did unlawfully, wrongfully, wickedly, fraudulently and deceitfully conspire, combine, confederate and agree together, and with divers other persons whose names are to the grand jurors unknown, to get and obtain, knowingly and designedly and by false pretenses, the moneys, goods, chattels, and property of the stockholders, creditors and depositors and customers of the said bank, and of such other persons who might believe certain false representations and pretenses thereafter named to be true, and become stockholders, depositors, creditors and customers of said bank, by means of divers false pretenses and subtle means and devices in substance as follows: "that is to say, to represent and pretend to said stockholders, depositors, creditors and customers of said

Bank of America, and to such other persons who might believe such representations and pretenses as herein-after named to be true and become stockholders, depositors, creditors and customers of said Bank of America, that the said Bank of America was carrying on a profitable banking business; that its pecuniary affairs were in a sound and prosperous condition; that the capital stock in the sum of \$250,000 of the said Bank of America was then and there all fully paid in, in cash, and that the said Bank of America then and there had a surplus of \$250,000, all fully paid, and that the said Bank of America was then and there solvent, and that the said Bank of America then and there had total resources to the value and amount of \$803,090.60, and that the said Bank of America then and there had a capital stock in the sum of \$250,000, and a surplus in the sum of \$250,000, and that the said Bank of America had capital and surplus in the sum and to the amount of \$500,000; whereas in truth and in fact, as they, the said Abner Smith and Jerome V. Pierce, the said Gustav F. Sorrow and the said Frank E. Creelman, then and there well knew, the said Bank of America then was not carrying on a profitable banking business; that its pecuniary affairs were not in a sound and prosperous condition; that the capital stock in the sum of \$250,000 of the said Bank of America was not then all fully paid in in cash, and that the said Bank of America did not then have a surplus of \$250,000 all fully paid, and that the said Bank of America was not then solvent, and that said Bank of America did not then have total resources to the value and amount of \$803,090.60, and that the said Bank of America did not then have a capital stock in the sum of \$250,000 and surplus in the sum of \$250,000 and that the said Bank did not then have capital stock and surplus in the sum and to the amount of \$500,000, to induce such stockholders, depositors, creditors and customers of said Bank of America and such other persons who might believe said false representations

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and pretenses to be true and become stockholders, depositors, creditors and customers of said Bank of America as were ignorant of the true state of affairs of the said Bank of America, to purchase and hold stock thereof, to deposit money therein, to become creditors thereof and to deal therewith, with intent then and there fraudulently and maliciously to cheat and defraud the said stockholders, depositors, creditors and customers of said Bank of America, and the said other persons who might believe the said false representations and pretenses to be true and become stockholders, depositors, creditors and customers of the Bank of America, of their money, goods and property, contrary to the law and against the peace and dignity of the same people of the state of Illinois."

The fifth count is practically identical with the third count, with the exception that it charges the proposed victims of the conspiracy to be the public.

The sixth count is substantially the same as the third, except that the false pretenses are charged to have been contained in a false written statement purporting to be a statement of the true condition of the affairs of the bank, which was made, circulated and published by the defendants, which false written statement is in the following words:

"BANK OF AMERICA,

N. E. Corner Clark and Randolph Streets,
Chicago.

Opened for business December 4, 1905.

Statement of the condition of the Bank of America at
the opening of business January 30, 1904:

RESOURCES.

Loans and discounts.....	\$544,575.61	
Stocks and bonds.....	70,500.00	
Mortgages	69,500.00	
	<hr/>	\$684,725.61
Furniture and Fixtures.....		10,488.88
Expenses paid.....		12,403.02

Due from Banks and Bankers..	57,760.53	
Cash and Checks for Clear- ing House.....	37,712.56	
		95,473.09
		<u>\$803,090.60</u>

LIABILITIES.

Capital Stock		250,000.00
Surplus		250,000.00
Interest and Exchange.....		10,682.85
Individual deposits.....	\$212,202.06	
Savings Deposits.....	23,597.18	
Certificates of Deposit.....	46,223.00	
		282,022.24
Certified checks.....	8,534.89	
Cashier's checks.....	1,850.02	10,385.51
		<u>\$803,090.60</u>

I hereby certify that the above statement is correct.

J. V. PIERCE,
Cashier.

Subscribed and sworn to before me, a notary public in and for the County of Cook, State of Illinois, this first day of February, 1905 (6).

CHARLES A. SAWTELLE,
Notary Public."

The seventh count is substantially the same as the sixth, except that it charges that the proposed victims of the conspiracy are the public.

The eighth count does not contain the inducements set forth in the other counts, but is a statutory count grounded on section 46 of the Criminal Code, and charges the defendants with a conspiracy to obtain money from the public by false pretenses, and does not set out in what such false pretenses consisted.

The ninth count is identical with the eighth except that it concludes "contrary to the law."

The conspiracy charged relates to the procuring by Smith, Sorrow and Pierce of a charter from the State of Illinois, establishing the "Bank of America" at

Chicago, by fraudulent representations as to the amount of capital stock subscribed and paid for and the cash and other assets in hand contributed to and to be used by the bank upon being chartered, the procuring of subscriptions to its stock and surplus by false pretenses of its capital, surplus, cash and other resources, thereby deceiving and defrauding purchasers of the bank's stock, persons that became depositors and creditors of the bank, etc.

The evidence, wholly that proffered by the People, there being no countervailing testimony offered by Smith and Sorrow or either of them, is to the effect that the idea of forming a bank initiated with Sorrow in the summer of 1905, who approached Smith in the early fall of that year in an effort to enlist his co-operation. This Sorrow succeeded in doing, and the two joined with them Jerome V. Pierce, the convicted defendant. Smith, who had been a lawyer, and for a decade a judge of the Circuit Court of Cook county, left the bench in 1903, and went into the business of loaning money on real estate security. Sorrow was in the real estate business, had been a manufacturer of slot machines, the keeper of a drug store, and had done some corporate promoting in a minor way. Pierce had been credit man in a wholesale drug house for twenty years, and Frank E. Creelman also indicted but acquitted, who joined his co-defendants at a later date, was a lumberman, a promoter and organizer of many enterprises. None of the defendants were bankers or had had any experience in banking. So Robert H. Howe, who had been bookkeeper, note teller and paying teller in the Commercial National Bank of Chicago, was appointed assistant cashier.

A permission to organize the "Bank of America" was granted by the State Auditor on the 21st day of October, 1905, upon the application of Robert H. Howe, Thomas J. Healy and Abner Smith. The capital authorized was \$250,000, divided into 2,500 shares of \$100 each, and after an affidavit had been filed with

the auditor, signed and purporting to be verified on the 29th of November, 1905, by all of the directors, including the indicted defendants, that all of the capital stock of \$250,000 was actually paid in in cash and that no part thereof was in notes or pledges of any description, and that such capital was then in the hands of the proper officers at the bank to be used by them solely in the legitimate business of the bank when the same should be opened, the state auditor, on December 2, 1905, granted a charter to the "Bank of America" to commence business as a bank for the purpose of discount and deposit, and to buy and sell exchange, and to do a general banking business, excepting only issuing bills to circulate as money, and with power to loan money on personal and real estate security, and to accept and execute trusts.

On September 26, 1905, Abner Smith subscribed for 1,250 shares of capital stock, for which he agreed to pay \$200 per share, \$100 for the stock and \$100 for the surplus account. The subscription was signed "Abner Smith, Trustee." On September 20, 1905, Pierce subscribed for 120 shares of stock and Sorrow for 125 shares of stock on the same terms as the Smith subscription; and on November 15, 1905, Creelman upon the same terms subscribed for 250 shares of stock. The Creelman subscription was made by Smith in virtue of a telegram from Creelman from New Orleans. Sorrow represented that Smith was a rich man, able to pay for \$250,000 of stock. On October 20, 1905, Smith represented that he had a million and a half in loans handled by his office in the Chicago Opera House building; that the various banks were carrying the loans, and represented that such loan business would be turned over to the new bank as a foundation for its real estate and loan department. In July preceding Smith had sold his real estate and loan business to Caswell & Healy without reserving any interest in it to himself.

Smith claimed in his subscription of stock as trus-

tee that he was backed by New York parties, but refused to give their names. On December 2, 1905, two days before the bank was open for business, Smith stated to Sorrow and Howe that he had received a blow between the eyes and had met with a great disappointment because the parties who were to supply the funds and securities for the subscription he had made had gone back on him, and that they would therefore have to make a temporary arrangement.

Smith, Sorrow, Pierce and Howe acted as an organization committee, and on the 13th of November, 1905, there were a number of letters sent out signed by Pierce as chairman of the organization committee, in which the organization of the bank, its capital stock, the price of it and the manner of banking business contemplated to be conducted were set forth. Among other things it was stated that the business of the bank would be conducted in connection with over 200 receiving stations distributed among the leading drug stores of the city of Chicago who would receive deposits and sell New York Exchange, to take the place of express and postal money orders. In that letter it was also stated "that while the stock has been subscribed for, the allotment will be made with a view to the relative value of the stockholders to the bank. An invitation is hereby extended to you to subscribe for a small amount." Blank forms of subscription were enclosed, together with a partial list of the more prominent stockholders.

The first meeting of the stockholders was held at the Sherman House on the evening of the 29th of November, 1905, the business of the meeting being preceded by a banquet, at which Pierce stated that the capital stock had been over-subscribed to the amount of \$135,000. The bank organized at this meeting by electing fifteen directors, including all the defendants in the indictment. The directors so elected immediately thereafter proceeded to choose the executive officers of the bank. Abner Smith was elected president, Gustav F.

Sorrow vice-president, Jerome V. Pierce cashier, Robert H. Howe assistant cashier, Daniel M. Healy secretary, and Daniel D. Healy trust officer. Smith, Pierce and Sorrow were made a discount committee to pass on loans to be made by the bank. The directors also took the oath prescribed by the statute, that they would comply with the statutes of the state of Illinois with reference to banks, etc., and faithfully discharge their duties as directors to the best of their abilities.

The money paid for stock subscription and surplus account was deposited with the State Bank of Chicago, which became the temporary depository for the Bank of America. The account was kept in the name of Jerome V. Pierce as cashier.

Smith negotiated with the State Bank a loan of \$25,000 to be applied on his stock subscription account. A note for this amount was signed by Smith, Pierce and Sorrow, and as collateral there were deposited three certificates of stock of fifty shares each. Nothing had been paid upon any share of the 150 shares of stock deposited as collateral to the \$25,000 loan.

Sorrow paid nothing on his stock subscription. He had given a check of \$4,000 to the bank on December 2nd, and it was credited on his stock subscription account. But he repudiated this application and insisted that the \$4,000 should be placed in a checking account as a deposit, and on December 4th, the day the bank opened, a cashier's check for that amount was given to him, which he placed to such an account and afterward checked out.

Pierce paid for his stock \$20,000 just preceding the opening of the bank, by borrowing that sum from his uncle, George J. Robinson, who lived in Michigan, and on the day the bank opened Mr. Robinson's note for \$20,000 was discounted by the bank and that sum paid by the bank to him.

Before the bank opened for business Creelman paid \$10,000 on account of his \$50,000 subscription to the

bank's stock. When Creelman was called upon for the payment of the remaining \$40,000 he did not have the money wherewith to pay it, and so he resorted to and carried out the following scheme: Creelman, acting through one Edmondson, his agent, who held power of attorney from Creelman, had Pierce draw a cashier's check for \$40,000 against the fund on deposit in the State Bank. This cashier's check was taken to the Federal National Bank by Edmondson, who borrowed from that bank the needed \$40,000. Mr. Isaac N. Perry, the president of the Federal National Bank, agreed to hold this cashier's check of the Bank of America and not put it through the Clearing House until the next banking day, and to accommodate Creelman agreed to hold the check until that time, which was December 4th, the first day on which the Bank of America opened its doors for the transaction of business. The Federal National Bank gave its certified check for \$40,000, payable to Creelman, who indorsed the check and delivered it to the Bank of America, and on that day it was deposited in the State Bank to the credit of the Bank of America. The Bank of America paid the \$40,000 check of its cashier, Pierce, in the regular course of business, on December 4th, the first day the bank did business under its charter.

On December 2, 1905, C. C. Jones, a state bank examiner, representing the state auditor, appeared at the Bank of America with its charter, to ascertain whether the bank was in condition to justify its receiving a charter. Bank Examiner Jones, together with Smith and Howe, went to the State Bank. Smith and Pierce, on arriving at the bank, drew a check for \$250,000 upon the funds then on deposit with the State Bank for the account of the Bank of America, and presented it to the State Bank for payment. This check was paid and the money counted by Jones. No questions were asked by or information proffered to Jones as to whether the \$250,000 was capital or sur-

plus, or both, or whether the Bank of America had any drafts or checks outstanding against its account with the State Bank, but the whole tenor of the conversation represented the amount as capital and not surplus. Before the check for \$250,000 was drawn, there was on deposit in the State Bank of the funds of the Bank of America \$271,000. There was also a small amount to the latter's credit in the Metropolitan Trust & Savings Bank. Jones being satisfied that the requirements of the law had been complied with, delivered the charter to Smith for the bank. On the day the charter was delivered to Smith, Pierce, Sorrow and Smith proceeded in an attempt to make good the deficiency of stock subscriptions made necessary through Smith's statement that the people whom he relied upon to make good his stock subscription had gone back on him.

Smith, Sorrow and Pierce undertook to procure notes to take the place of money for stock subscriptions, and Pierce on that day and the following drew up notes aggregating \$229,000, to which accommodation signers were procured, Smith and Pierce indorsing them all and Sorrow also some of them. The signers of the notes were financially of little account, and executed their respective notes without consideration, at the request of Sorrow, Smith or Pierce, respectively. These notes were used to represent the payment of stock subscriptions up to their aggregate amount.

On the 4th of December, 1905, application was made to the Commercial National Bank by the Bank of America for Clearing House privileges. A statement of the condition of the bank was made to James H. Eckels, its president. He refused to act for the bank, on the ground that there was too much liability on the part of Abner Smith. Thereupon new notes were secured identical with many of the former ones, but without the indorsement of Smith.

Among the notes thus standing for stock subscription after the change were the following:

A note of E. H. Smith for \$24,108, payable ninety days after date. The note was signed at the request of Abner Smith by the maker, who was his nephew and a clerk in the Knickerbocker Ice Company. Abner Smith gave his note to the maker of like amount and tenor. A note of E. J. Healy for \$8,000 payable in ninety days. Healy was a member of the firm of Healy & Rennen, in which firm Pierce was a partner. The firm subsequently went into bankruptcy. Healy signed the note as an accommodation to Pierce. At the request of Pierce, F. A. Stebbins gave a note for \$12,150, payable in ninety days. Alexander Harris, at the request of Pierce, gave a similar note for \$7,200, and Allen R. Fellows, at the request of Pierce gave his note for \$8,000. At the request of Pierce, W. C. Shackleford gave a note for \$8,000. Charles Haight gave a note for \$15,255, and Julius Wahl one for \$11,140, both at the request of Abner Smith. Mamie Kaufman, a serving maid in the employ of Sorrow, gave a note for \$9,575. L. G. Mueller signed C. C. Webb, the maiden name of his wife, without authority, to a note for \$2,750, and gave his own note for \$8,000, payable in ninety days. This was for the accommodation of Sorrow. Wahl and Haight were financially irresponsible. E. H. Stratman, who was employed by the bank to solicit customers, gave a note at the request of Sorrow for \$1,671.45. Ferdinand Jones gave a note for \$8,755.25. The identity of Ferdinand Jones has not been disclosed. The note appears to be in the handwriting of an immature child. Sorrow had a son named Ferdinand, ten years old at the time the note was given. Beatrice Irmgoode gave a note for \$6,515.25, the proceeds of which were credited to Sorrow's subscription. The signature to this note indicates that it is that of a child of immature years. W. B. Greenwood gave a note for \$4,000. He was employed by the bank as a night teller, was without financial responsibility, and gave the note at the request of Sorrow. Edward C. Clark gave two notes,

one for \$9,450 and the other for \$8,750. He had not been found by the receiver at the time of the trial. The wife of Pierce gave a note for \$16,000 and his daughter one for \$4,000.

Stebbins' note for \$12,150 was indorsed by E. H. Stratman. The note of Charles Haight for \$15,255 was indorsed by Ada C. Smith, the wife of Abner Smith. The note of Julius Wahl was indorsed by J. Walter Lamb, a brother of Abner Smith's wife, who was without financial responsibility. The note of Mamie Kaufman was indorsed by Kate L. Sorrow, the wife of Gustav F. Sorrow. The C. C. Webb note was indorsed by L. G. Mueller. Mueller's note was indorsed by E. H. Stratman. Ferdinand Jones' note was indorsed by Beatrice Irmgoode, and Beatrice Irmgoode's note was indorsed by J. Allen White. The two notes made by Edward C. Clark were indorsed by E. H. Stratman.

On December 15, 1905, the State Bank Examiner in making an examination of the affairs of the bank, found fault with the original notes indorsed by Smith, and on a later examination also expressed dissatisfaction with the new notes.

Statements were printed and circulated, by mail and in person, under the names of the directors and officers of the bank, including all the indicted defendants, setting forth that the capital stock of \$250,000 and the surplus of \$250,000 were all fully paid. Solicitors were also sent out to secure subscriptions to the capital stock and to obtain deposit accounts. On these and like representations Smith sold \$10,000 worth of bank stock to W. B. Martin on January 19, 1906, at \$200 per share. Joseph Beifeld bought because of them fifty shares of stock at \$9,250.

On the windows of the bank appeared a sign, readily readable from the street, that the capital and surplus of the bank was \$500,000.

On the 29th of December, 1905, \$10,000 was paid on account of the Sorrow, Pierce and Smith note of November 22nd. This was paid by check drawn by Pierce,

the cashier of the Bank of America, on the State Bank of Chicago, payable to the order of the State Bank.

On January 23, 1906, Sorrow, Pierce and Smith gave a new note of \$25,000 to the State Bank and put up for security a mortgage made by Albert D. Ferry for \$45,000 on which the Bank of America had loaned to William H. Freeman the sum of \$30,000. The State Bank discounted this \$25,000 note, crediting Pierce's account with \$24,789.75. Out of the proceeds Pierce paid Smith's note of November 22, 1905, which at that time, with interest, amounted to \$15,375. On January 24th Pierce checked out of his account \$4,414.75 and deposited his check in the Bank of America. That amount was credited upon the \$20,000 note of Mr. Robinson, the uncle of Pierce, which he had given December 4, 1905. On February 6, 1906, Pierce gave the State Bank a check for \$5,000 to apply on the second note which he, Sorrow and Smith had given to the State Bank, secured by the Ferry mortgage. This closed Pierce's account with the State Bank and left a balance of \$20,000 unpaid upon the Sorrow, Pierce and Smith note of January 23, 1906.

When Mr. Haugan, president of the State Bank, discovered that the 150 shares of stock of the Bank of America, which he held as collateral to the note of November 22, 1905, had not been paid for, he demanded additional collateral of Smith; whereupon Smith took the Ferry mortgage and gave it to him in compliance with his demand. Upon discovering that Smith had hypothecated the Ferry collateral with Haugan, he was requested to have the same returned to the bank at once. He succeeded in procuring the return of the collateral by giving a note to the State Bank signed by Pierce and Darrow for \$6,666.66, giving his own note for \$6,420.72. He gave another note of Brown and Smith, paving contractors, for \$3,000, and paid cash and sundry checks amounting to \$3,910.62, which with the \$3,000 note of Brown and Smith aggregated \$6,910.62. This extinguished the debt on the first note

of Sorrow, Smith and Pierce, which was finally paid February 19, 1906, four days after the Bank of America had been put into the hands of a receiver.

On the 26th day of December, 1905, Smith secured a demand loan of \$16,000 from the Metropolitan Trust & Savings Bank and put up as collateral a cashier's check of the Bank of America for \$10,000. This note was paid by Smith on December 29, 1905, by Smith's check on the Bank of America for \$973.32 and by giving the Bank of America's cashier's check for \$15,034.68.

On the 30th of December, 1905, Smith secured another loan from the Metropolitan Trust & Savings Bank for \$10,000 upon his note payable January 3, 1906. He gave as collateral for this loan the Ferry note and mortgage. He paid this \$10,000 loan on the 6th of January, 1906, by giving the Metropolitan Trust & Savings Bank a cashier's check drawn by the Bank of America on the State Bank of Chicago.

The first week the bank was open Smith obtained \$15,000 on his serving maid's, Mary Dufficy's, note. On December 29th Smith took out of the bank \$10,000 more on another note signed by Mary Dufficy. The mortgages securing these two notes, the evidence shows, were of little or no value.

On examination of the affairs of the bank on December 22, 1905, by the bank examiner, that official reported that the liabilities of the directors of the bank were \$142,031.32; that loans to Creelman and his son and to Frank M. Patten Co., in which the Creelmans were interested, were about \$145,000. He reported that the Patten paper was questionable, and the Creelman loans were altogether too much, as they aggregated within \$40,000 of the total bank deposits. He reported the liability of the stockholders as \$247,384.90.

During this time literature was issued and advertisements made, inserted in the public press of Chicago, stating that the capital and surplus of the bank

amounted to \$500,000 and that it was all fully paid, and soliciting savings accounts and checking accounts of all kinds. Stock was sold to the public at \$200 a share, and representations were made by some of the defendants that the stock would pay twenty per cent. on the investment. New accounts were opened, both savings and checking, so that on February 14, 1906, there were checking accounts to the amount of \$248,067.07 and savings deposit accounts amounting to \$25,424.49.

Responding to a call of the state auditor on January 30, 1906, a statement of the bank's condition was prepared and sworn to by Pierce, which statement showed loans and discounts to the amount of \$614,225.61; bonds and securities, etc., on hand to the amount of \$70,500. The loans and discounts included \$157,800 of accommodation paper of little or no value. The bonds and securities included certain Avoylles and Lattanier bonds, said to be worth fifty cents on the dollar, which were received from Creelman.

On the afternoon of the 14th of February, 1906, Pierce and Darrow and Howe, and others interested in the Bank of America, secured a meeting with the Chicago Clearing House Committee and exhibited to them the bank's assets, with the expectation of receiving financial assistance to tide them over their difficulties, but aid was refused, Mr. Haugan of the State Bank having previously refused to take over the assets and pay the depositors. Thereupon application was made to the Superior Court for the appointment of a receiver, and Daniel D. Healy was appointed receiver and took possession of the assets of the bank.

The bank was in existence seventy-three days, during which time it lost approximately \$175,000. The accounts, both checking and saving, were paid in full. The stockholders who paid for their stock it is estimated will receive one-fourth of the amount which they put into their investment.

STEDMAN & SOELKE, A. N. WATERMAN and U. P. SMITH, for plaintiffs in error.

JOHN J. HEALY, State's Attorney, HOBART P. YOUNG and ROGER SHERMAN, for defendant in error.

MR. PRESIDING JUSTICE HOLDOM delivered the opinion of the court.

The errors assigned and urged upon us in argument resolve themselves into the following contentions:

First, that the indictment and every count of it is so defective that it does not sustain the judgment of conviction; second, that the evidence is insufficient to sustain the charge of conspiracy to obtain money and other property by false pretenses; third, that Howe's testimony was rendered incompetent because of his having testified before the grand jury, he being a co-conspirator with plaintiffs in error and not being so designated in the indictment, and this also made a variance between indictment and proof, and fourth, errors committed by the trial court in his ruling upon evidence and in instructions to the jury.

First. The indictment charges the defendants with a conspiracy to obtain money by false pretenses. So to conspire is both a statutory and a common law offense, and persons so offending may be indicted either under the statute or at common law, or both, as in this indictment. We have analyzed the several counts in the indictment and are of the opinion that each count substantially charges a conspiracy to obtain money by false pretenses, which is a charge of conspiring to do an unlawful act.

The eighth count in effect charged violation of section 46, chapter 38 R. S., which provides: "If any two or more persons conspire or agree together * * * to obtain money or other property by false pretenses * * * they shall be deemed guilty of a conspiracy; and every such offender and every person convicted of conspiracy at common law shall be imprisoned in the

penitentiary not exceeding five (5) years or fined not exceeding two thousand dollars (\$2,000), or both.”

This count charges the statutory offense of conspiracy to obtain money by false pretenses, and does not set out or show in what such false pretenses consisted. The *gravamen* of the offense is the conspiracy to do the unlawful act. It is not the false pretenses which constitute the crime, but the conspiring together with the design to make such false pretenses.

Thomas v. The People, 113 Ill. 531, was an indictment for conspiracy to obtain the goods of another by false pretenses. The indictment charged the conspiracy and that it was with a fraudulent intent to feloniously and wrongfully obtain a horse and other property from one Kate Carberry by false pretenses and to cheat and defraud her, etc. In this indictment the false pretenses were not set out, and because of such omission it was contended the indictment was not sufficient. In overruling this contention the court say:

“The first count under the ruling in this state, whatever may be decided elsewhere, is clearly good. To obtain goods by false pretenses is, to every apprehension, an illegal act; and the rule here is, where the act to be accomplished by the conspiracy is illegal, it is unnecessary to specify the means by which it was intended to be accomplished. Johnson v. People, 22 Ill. 314; Smith v. People, 25 *id.* 17; Cowen v. People, 14 *id.* 348. The first count in the present indictment is identical with the count in Johnson v. People, *supra*, and which was held to be good.”

In Chicago, Wilmington & Vermilion Coal Co. v. People, 214 Ill. 241, the charge was conspiracy to do an illegal act injurious to the public trade, by entering into a trust agreement to illegally fix the price of coal. There was no specification of the means used in forming the conspiracy set out in the indictment. It was contended that the purpose was lawful, and that the means used therefor should have been set out in the indictment. On this point the court say:

“Those counts charged that the object of the conspiracy was unlawful, and not that its object was lawful and the means of its accomplishment unlawful. It was therefore unnecessary to set out the means whereby the conspiracy was to be accomplished; *Thomas v. People*, 113 Ill. 531; neither was it necessary that the object of the conspiracy constitute an offense against the criminal law for which an individual might be indicted and convicted; *Smith v. People*, 25 Ill. 9; but if the object thereof was unlawful, said count sufficiently charged a conspiracy at common law.” *State v. Buchanan*, 5 Harris & Johnson, 317; *Cole v. People*, 84 Ill. 216.

If the proof sustain the statutory conspiracy charged in the eighth count of the indictment, then without regard to the soundness of the other counts it is sufficient to sustain the conviction. As said in *Thomas v. People*, “If either of the counts for conspiracy be good, it will sustain the verdict. *Lyon v. People*, 68 Ill. 276, and cases cited.”

In *Ochs v. People*, 124 Ill. 414, the indictment consisted of five counts. The first count being challenged as insufficient, the court say: “Whether there is anything in substance in this variance we need not consider, for even if the count be defective that would be of no avail, it being a well settled principle that a conviction on a general verdict will be sustained, although some of the counts are faulty, if there be one good count in the indictment. *Hiner v. People*, 34 Ill. 297.”

Section 408, chapter 38, R. S., provides: “Every indictment or accusation of a grand jury shall be deemed sufficiently technical and correct, which states the offense in the terms and language of the statute creating the offense, or so plainly that the nature of the offense may be easily understood by the jury.”

The eighth count is in the language of the statute, and the means by which the end of the conspiracy was accomplished is, we think, plainly apparent from the

averment of most of the other counts of the indictment, and as said in *Tedford v. People*, 219 Ill. 23: "If the indictment is so plain that the nature of the offense with which the defendants are charged can be easily understood by the jury and by the defendants, that is all that the law requires."

We are satisfied that the indictment meets the requirements of the statute, as interpreted by the Supreme Court in cases *supra*.

It was held in *State v. Buchanan*, *supra*, "that in a prosecution for a conspiracy, it is sufficient to state in the indictment the conspiracy and the object of it; and that the means by which it was intended to be accomplished need not be set out, being only matters of evidence to prove the charge, and not the crime itself, and may be perfectly indifferent, as in *Rex v. Eccles*, and *Rex v. Gill & Henry*."

In section 208, volume 2, Bishop's New Criminal Procedure, the author says: "No indictment is ever required to charge one with what the law has not made a part of his crime; and when two or more combine to cheat another, they become guilty of a criminal conspiracy, although they have not even considered the means; hence, as agreed means are not essential to the offense, it would be a perversion of justice to require the prosecuting power to allege them."

It is again urged that the indictment is deficient because it fails to charge that the conspiracy was formed against any individual, but against the public generally. There are many decisions, British and American, showing the fallacy of this contention. One of the most instructive is *Reg. v. Gurney*, 11 Cox's Criminal Cases, 414, which is peculiarly applicable because it is a case involving banks and banking as in the case at bar. Lord Chief Justice Cockburn, in summing up the case to the jury, said: "It is not because a conspiracy to defraud is directed against the general public, that it is the less an offense, by reason that you have not in your eye a particular individual

who is defrauded. Independently of which it is quite plain that any conspiracy having for its purpose to defraud those individuals of the general public who may be caught by it, is a continuing conspiracy until it shall have arrived at its accomplishment and completion. As soon as the particular individual is brought into contact with the conspirators, the conspiracy, which before was general, becomes in this case, if I may use the expression, individualized and fixed; and that which was a conspiracy to deceive the general public becomes a conspiracy to deceive and defraud particular individuals." Reg. v. Brown, 7 Cox's Criminal Cases, 422; and in Reg. v. Esgile, 1 Foster & Finlanson, 213, the court said to the jury: "It is for you to say whether the balance sheets were not falsified to deceive the public and concealed the true state of affairs and to delude persons into purchasing shares; and whether the defendants were not privy to the common design to effect that object by those means."

The dates in the seventh count, in which it is charged that the acts constituting the conspiracy were committed, are said to be so inconsistent and impossible as to constitute a fatal defect in the indictment. We regard the exact date as immaterial. While a date must be stated in the indictment, yet the proof is not necessarily confined to the date stated, provided some date is proven as the date on which the offense charged in the indictment was committed. The date is laid under a *videlicet* and any date within the period of the statute of limitations would suffice.

It is our opinion that the refusal of the trial court to quash the indictment was without error.

Second. On the question of the guilt of the plaintiffs in error we are by the record restricted to the evidence introduced by the State to sustain the indictment, in connection with the testimony of Pierce (called in his own behalf), as neither Smith nor Sorrow proffered any proof in denial of the charge and

introduced no evidence in an effort to exculpate themselves from the charge in the indictment or repel the proof of the State supporting it, save only witnesses produced to testify as to their former good character in the community. Neither did they go upon the witness stand in their own defense. While a defendant in a criminal prosecution is not disqualified from being a witness in his own behalf, yet it is for him to choose whether he will testify, and it is the statute law that a defendant's neglect to testify shall not create any presumption against him, nor shall such action be the subject of comment before the jury. Nevertheless, the record lacking any explanation of the charge in the indictment by plaintiffs in error, or any witness for them, we cannot assume that any matter or excuse not developed by the State's proof is available to them as a defense. Consequently our consideration of the case and our judgment on the probative force of the evidence in determining the guilt or innocence of Smith and Sorrow, must be restricted to the case made by the State, in connection with Pierce's testimony.

The evidence is voluminous and rests in the testimony of more than one hundred witnesses. We have given as concise and brief a synopsis of this evidence as we were able to encompass within reasonable limits in the statement preceding this opinion, and to more than briefly touch its vital points in this review is neither necessary nor practicable. If the law required proof that the indicted persons in fact assembled together and concocted, made out and planned, the conspiracy charged, then this prosecution must fail; but if, on the contrary, all the law requires is to establish by proof facts connecting the defendants with the conspiracy charged, and their relation to it, as it gradually developed to its final accomplishment, then the conviction must stand.

The charge resolves itself into one of conspiracy to obtain money by false pretenses, and the means used in accomplishing the purposes of the conspiracy was

the establishment of a bank under the laws of Illinois to be called the Bank of America. This bank was first conceived by Sorrow, who succeeded in interesting Smith. The state auditor, upon the application of Smith, Robert H. Howe and Thomas J. Healy, on October 24, 1905, granted permission to organize the Bank of America, with an authorized capital of \$250,000, divided into 2,500 shares of \$100 each. It is shown that the indicted defendants agreed among themselves that beside the capital of a quarter of a million of dollars a like sum should form the surplus of the bank; that to procure such capital and surplus, shares of stock of the bank should be sold at the rate of \$200 per share. Smith, who had been engaged in making loans upon real estate, represented that he had a loan business amounting to a million and a half dollars, which could be used to form the nucleus of the real estate loan department of the bank, while as a matter of fact he had, previous to the making of such representations, disposed of his business as a mortgage broker to Caswell & Healy. Smith subscribed for one-half of the stock of the bank as trustee, but as he failed and refused to disclose his pretended principals, his subscription must be regarded as his own. Sorrow subscribed for 125 shares, Pierce for 120 shares, and Creelman for 250 shares. Other parties were interested and the balance of the stock subscribed. On the 29th of November, 1905, a meeting of the subscribers to the stock was held, at which Smith and Sorrow and Pierce were present, and a board of fifteen directors was selected. At that meeting it was stated by Pierce, and not denied by anyone, that the stock had been over subscribed to the extent of \$135,000. The directors assembled after the stockholders' meeting and elected officers, Smith being elected president, Sorrow vice-president, Pierce cashier, and Robert H. Howe assistant cashier. A statement was made as required by the statute, signed by all of the directors, including Smith and Sorrow, that

all of the stock had been subscribed for and paid in in full, in cash; that no part thereof was in notes or pledges of any description, and that such capital was then in the hands of the proper officers at the bank, to be used by them solely in the legitimate business of the bank, when the same should be opened. This statement, verified as required by the statute, was filed with the state auditor.

The State Bank of Chicago was, pending the organization of the Bank of America, selected as the depository for the bank's moneys. Smith borrowed \$25,000 of the State Bank and deposited as collateral security 150 shares of the stock of the Bank of America, evidenced by three certificates of fifty shares each. The money was added to the funds of the bank, although the 150 shares of stock had not been paid for. Smith told Sorrow and Pierce that the parties who stood back of him in his subscription for half the bank's capital stock had failed him, and that he was unable to get any money from that expected source, that some arrangement would have to be made to tide over this condition so unexpectedly presented.

Sorrow did not pay any cash for the stock subscribed for by him. His repudiation of the application to the account of \$4,000 deposited by him, has been noted in the statement prefixed to this opinion. Pierce paid on his subscription \$20,000 borrowed from his uncle, whose money was immediately returned to him on his note at the opening of the bank. Creelman paid \$10,000 in cash and made a colorable payment of the balance of \$40,000 with a cashier's check of the Federal National Bank, which was afterwards, on the morning the bank opened for business, repaid to the Federal Bank on a cashier's check of the Bank of America, which had been practically "kited" for it. So far as cash resources went, these transactions, except Creelman's payment of \$10,000, were mere pretenses. They were matters of bookkeeping only.

On December 2, 1905, the day appointed for receiv-

ing the charter from the state auditor, C. C. Jones, a bank examiner connected with the state auditor's department, and acting for the state auditor, attended to examine the condition of the bank, to verify the statement as to possession of cash to the amount of the capital stock preparatory to delivering the charter. With him at the State Bank were Smith and Robert H. Howe. This is the first time that there is direct evidence of the conspirators acting in concert. They at that time well knew the falsity of the sworn statement that the capital stock had been paid for in full in cash. At this interview at the State Bank with the state auditor's representative, they again asserted to him that the bank's capital had been paid in cash, and was on deposit with the State Bank. At the State Bank Smith and Pierce drew a check for \$250,000 upon funds then on deposit to the credit of the Bank of America, which check was paid and the money counted by Jones, the state auditor's representative. At this time the Bank of America had a credit in the State Bank of \$271,000. Jones, however, was kept in ignorance of the fact that cashier's checks were outstanding against the bank's funds. On these surface appearances, unexplained, the charter, authorizing the bank to commence business, was obtained by Smith from the state auditor.

It therefore follows from this recitation of fact that the charter permitting the bank to do business was obtained from the state auditor by false and fraudulent pretenses, for if the truth had been made known to the representative of the state auditor, the charter would have been withheld; for, if the true condition of the bank's assets had been disclosed, as it should have been, the law would not have permitted the state auditor to deliver the charter.

Whatever view may be taken of the condition of the cash resources of the Bank of America at the time it received its charter, it is clear that it had not its capital stock paid in full in cash; that as a matter of fact

The People v. Smith, 144 App. 129.

its cash resources of every kind were much less than the par value of its capital stock. Not only this, but it is apparent that so far as the payment of its capital stock is concerned, less than one-half had been paid at that time, as one-half of the cash resources consisted of cash paid to surplus account by the paying stock subscribers. The conspiracy inferable from the acts of the parties prior to December 2, 1905, is on that date made glaringly apparent. The evidence of the conspiracy formed was then complete, although it had not been fully developed and consummated.

In furtherance of carrying to complete fruition this conspiracy, Smith and Sorrow and Pierce manufactured notes aggregating \$229,000. These were to take the place of money for stock subscriptions. These notes were signed by irresponsible parties not interested in the bank, and merely as an accommodation, and at the solicitation of Smith, Sorrow and Pierce. The makers of these worthless notes were the dependents, friends and indigent relatives of plaintiffs in error and Pierce, and all of such notes were indorsed by Smith.

Smith and Sorrow not only perpetrated such fraud upon the bank, but personally profited in some of the transactions. Upon examination of the bank's condition, reputable banks in Chicago refused to act as its clearance agent. Without any lawful right, on two occasions, Smith, to secure his personal debt, hypothecated the Ferry note for \$45,000, secured by mortgage, which the bank held as collateral to a loan of \$30,000 made to William H. Freeman.

The notes aggregating \$229,000, indorsed by Smith, were afterwards exchanged for like worthless notes without Smith's indorsement. This was done in an attempt to overcome an objection of the bank examiner and the Commercial National Bank that Smith was liable on too much of the bank's paper.

From the time the bank opened for business, statements were printed and circulated, and advertisements inserted in the public press of Chicago, under the name

of the officers of the bank, including plaintiffs in error, in which it was stated that the capital stock was \$250,000 and the surplus \$250,000, all fully paid; and on January 30, 1906, in response to a request of the state auditor, a statement was prepared and sworn to by Pierce, showing loans and discounts to the amount of \$614,225.61, which included \$157,200 of accommodation paper of little or no value.

In the faith of the verity of these representations stock was bought by the public at \$200 per share, and on January 19, 1906, Smith sold to W. B. Martin 100 shares of stock at \$200, and also thereafter sold fifty shares of stock to Joseph Beifeld for \$9,250.

On the first of February, 1906, the bank issued a statement, sworn to by Pierce as cashier, in which the resources of the bank were stated to be \$803,090.60, and from which it appeared that the capital stock and surplus together amounted to half a million dollars, and had been paid in full.

On the 15th of February, 1906, the bank went into liquidation, and closed its career of seventy-three days duration.

We think the facts fully sustain the unlawful conspiracy charged in the indictment. The conspiracy rests in the false pretense that the capital stock and surplus of a like amount had been paid in full in cash. The evidential fact of the falsity of such statement is concededly demonstrated by the proofs. Two hundred and twenty-nine thousand dollars of comparatively worthless notes were carried as cash. That the conspiring defendants had paid for their stock was another false pretense. Whether or not bank stock, under the statutes of this state, may be paid for in property other than cash, is beside the question and of no importance, as bearing upon the conspiracy charged and proved. The act would seem to indicate that cash was required to satisfy its provisions; but be this so or not, the indicted defendants and the other directors swore that it was so paid, and by their statements and

writings and advertisements so held out the fact to be. They were not true. They were pretenses of falsity. Such is virtually the admission of counsel for plaintiffs in error.

Martin, Beifeld and others were injured when they purchased stock in faith of these delusive and false representations. True it is that the evidence shows that depositors of the bank were paid in full; but it is just as true that a loss of considerable magnitude fell upon the stockholders who were lured to subscribe for stock in faith of the verity of the false representations made resulting from the conspiracy of the indicted defendants.

The burden of refuting the imputation of conspiracy established by these facts the law casts upon plaintiffs in error. The evidence supporting the conspiracy charged they have failed to repel by proof or from circumstances environing the several transactions.

Third. The indictment charges the indicted defendants with having "wrongfully, wickedly, fraudulently, feloniously and unlawfully conspired, combined, confederated and agreed together with each other, and with divers other persons, whose names are to the said grand jury unknown, to get and obtain money," etc. The proof shows that the witness Howe testified before the grand jury, and it is therefore argued that the grand jury knew that he was a co-conspirator with the indicted defendants, and that the indictment is consequently defective in not charging him by name as a co-conspirator, that there is a variance apparent between the proof and the indictment which is fatal. It might be a sufficient answer to this contention to say that the record fails to show *what* Howe testified to before the grand jury. No objections are found in the record to Howe's testifying upon the ground now urged as disqualifying him or as constituting a variance. The names of the persons with whom the indicted defendants conspired are not descriptive of the offense; it is a question of evidence, not of pleading.

This case is readily distinguishable from that of *Sullivan v. People*, 108 Ill. App. 328. In the *Sullivan* indictment neither the words "with persons to the grand jury unknown," nor words of like import were found. If Howe be regarded as a co-conspirator his testimony as to things done and conversations had with the indicted defendants was admissible. The controlling principle is stated in *Wharton on Criminal Evidence*, ninth edition, section 700, thus: "It makes no difference as to the admissibility of the act or declaration of a conspirator against a defendant, whether the former be indicted or not or tried or not with the latter; * * * the principle upon which they are admissible at all being that the act or declaration of one is the act or declaration of all united in one common design, a principle which is wholly unaffected by the consideration of their being jointly indicted."

In *People v. Fehrenback*, 102 Cal. 394, it was held that "the declarations of a conspirator who is not prosecuted are equally admissible with those of one under indictment and prosecution." *People v. Bentley*, 75 Cal. 407; *Van Eyck v. People*, 178 Ill. 199; *Williams v. State*, 47 Ind. 569; *Graff v. People*, 208 Ill. 312.

The latest expression of opinion by our Supreme Court, found in *Cooke v. People*, 231 Ill. 9, solves any doubt, if any heretofore existed, on this subject. In the *Cooke* case one *Seinwerth* was a witness before the grand jury, and as the proofs developed on the trial, a party to the conspiracy. He was not indicted or named in the indictment. As in this case, *Seinwerth's* testimony before the grand jury did not appear in the record. It was contended that it was inferable from the language of the indictment that the grand jury knew that *Seinwerth* was a co-conspirator with *Cooke*, and that from their failure to name him as a co-conspirator it followed that there was a variance between the indictment and the proof. But on the contrary the court held that it was clearly inferable, from the fact

that the indictment charged the conspiracy to be between Cooke and Charles H. Bradley and with divers other persons whose names were unknown to them, that the grand jury did not know Seinwerth was a co-conspirator; for, if the grand jury had been informed that he was a co-conspirator they would have named him as such in the indictment.

The Supreme Court in that case held, as we do here, that there was no variance between the indictment and the proof arising from the fact, developed during the trial, that one of the witnesses examined by the prosecution was a co-conspirator and was not named in the indictment.

Fourth. A careful scrutiny of the evidence admitted and argued by counsel for plaintiffs in error as erroneous fails to disclose any ruling adversely affecting their rights or the merits of the cause. All the evidence admitted related to the conspiracy charged in the indictment and were connecting links establishing it. The record bears evidence that the rulings of the trial judge on the admission of proof were fair and impartial; and we are, in the condition of this record, unable to say that any such errors occurred in regard to the court's ruling as would justify us in remanding the cause for another trial; for, as said in *Clark v. People*, 31 Ill. 479: "If the great object of a trial has been had and slight departures from form have occurred, it is not a sufficient reason for setting aside the proceeding and pursuing again all the forms of a new trial to arrive at the same result."

Among many objections made is one against the admission as evidence of the books of the bank, at the time of the trial, in the hands of the receiver. The difficulty with this objection lies in the inferential assumption, at least, that the books were the property of the indicted defendants, their own private papers, and therefore not admissible as being statements against themselves. Such, however, is not the fact. The books were the books of the bank, and in no sense

the individual property of any of the defendants. Such assumption by the conspirators is one of the evils which brought on this prosecution. The indicted defendants conspired to do the thing charged and in carrying out such conspiracy treated the bank and its property as their own. It was not error to permit the state to prove the value of the assets, or the value of the notes put into the bank in the place of cash for capital stock. It was material and relevant to prove such facts showing that by reason of the conspiracy charged loss had been sustained by parties investing their money in faith of the verity of the false pretenses made in pursuance of such conspiracy.

The court did not err in denying the motion for a bill of particulars, for the reason that the indictment in itself gave sufficient information of the crime charged, and there is nothing in the proof which shows that plaintiffs in error were taken by surprise, or were in any way prejudiced, because of lack of knowledge of the particular facts upon which the State depended for conviction. All the substantial and material facts proved are shadowed forth with sufficient particularity in the various counts of the indictment, and evidence properly received in support of them. This is in accord with the settled law of this state on that subject. *Gallagher v. People*, 211 Ill. 158; *Kelly v. People*, 192 Ill. 119; *DuBois v. People*, 200 Ill. 157.

Counsel for Smith says in his brief that he has argued the case "upon the assumption that all the evidence was admissible, and that no errors were committed upon the trial." This assumption is in harmony with our opinion. But little stress is laid by either counsel for plaintiffs in error, and by some of them none, calling in question the correctness of the court's instructions to the jury upon the law. The instructions given at the instance of the plaintiffs in error and their co-defendants, were unusually full and covered every conceivable phase of the law invokable as a defense under the proof on which the State rested

its case for a conviction. There is no point of law contained in the instructions refused material to the defense which is not embodied in some of the numerous instructions given. Three instructions refused, urged in argument by counsel for Sorrow as being improperly refused, relate to a contention that inactivity, negligence, or failure to do an act does not constitute the crime of conspiracy. These instructions were not relevant to the proof, and were but statements of abstract legal propositions. Criminal intent arises at times from the actions of the parties, when such actions are inconsistent with honest intent and are solvable only on the hypothesis of criminality, and such was the duty of the jury to find from the evidence before them.

Complaint is also made of a statement by the trial judge that Pierce could take the stand and contradict the statement made by a witness in his cross-examination. As this was personal to the defendant Pierce, it is sufficient to say that if it was a statement hurtful to his defense, he is not here complaining. He has bowed in submission and paid the penalty imposed by the law for his offense. We do not think that this remark of the court was in any manner prejudicial to the rights of the plaintiffs in error.

We are of the opinion that the evidence of the State sustains the conspiracy charged in the indictment, and that the indictment aptly charged against the defendants a statutory and common law conspiracy. We are fortified in this conclusion by many authorities, some of which we have cited in this opinion, and particularly by the case of *Reg. v. Brown*, *supra*. This was an information by the attorney general, charging the directors of the Royal British Bank and its general manager with conspiring, by false representations, to defraud the shareholders and customers and the public. This conspiracy arose from the fact that after the insolvency of the bank was known to the defendants, they published false statements, that the bank was a solvent, thriving institution; also with the knowledge

of the insolvency of the bank issued new shares, and bought shares with the bank's money, in order to keep up the price, inviting shareholders to buy new shares, and inviting persons to open accounts with the bank. Lord Campbell charged the jury that "if the defendants knew of the insolvency of the bank at the time they sold new stock and invited the public to purchase shares and to open accounts with the bank, then they ought to be found guilty; but if any of them did not know of its insolvent state then they should be acquitted." With regard to the conspiracy he said: "It is not essential that evidence should be given of any formal consultation, in which the parties are supposed to have deliberately resolved to do an illegal act or to do a legal act by illegal means; but if, as reasonable men, you see there was a common design, and they were acting in concert to do what is wrong, that is evidence from which a jury may suppose that a conspiracy was actually formed." The jury under this charge found all of the defendants guilty. Many of the acts forming the conspiracy in the Royal British Bank case are similar to those charged in the case at bar. In the former the conspiracy consisted in holding out the bank to be solvent after knowledge of its insolvency. Here the conspiracy started with the false pretense that the capital stock of the bank was fully paid in, in cash; and upon the apparent verity of such representation the state auditor was deceived, and the charter of the bank procured. This was preceded by issuing cashier's checks against the bank funds and withholding such facts from the representative of the state auditor. This was followed up by the saddling upon the bank a large amount of worthless paper of irresponsible persons in pretended payment for the stock of the bank; in almost looting the bank by loaning to Creelman and to institutions in which he was interested about \$145,000, which was within about \$40,000 of the total deposits of the bank; in failing to pay their stock subscriptions; unlawfully appropriat-

Burdette v. Munger, 144 App. 164.

ing the securities and money of the bank to their own use; in making sworn and other statements and publishing advertisements of the bank's assets, resources and liabilities, which were false, under which false pretenses stock was sold to innocent parties at \$200 per share and customers and depositors and *bona fide* shareholders of the bank were deceived. These are the main and evidential facts constituting the conspiracy which resulted, after an existence of seventy-three days, in the bank closing its doors, being put into the hands of a receiver, making a loss in the vicinity of \$175,000, which loss fell upon the *bona fide* and deluded stockholders.

We find no errors in this record justifying this court in reversing the judgment of the Criminal Court, and it is therefore affirmed.

Affirmed.

J. W. Burdette, Appellee, v. O. B. Munger, Appellant.
Gen. No. 14,131.

1. **MANDAMUS**—*when judgment in, cannot be questioned.* In a proceeding for contempt for failure to obey a writ of *mandamus*, the formality of the judgment rendered in the *mandamus* proceeding and the merits of the cause in which it was rendered cannot be questioned, where the court had jurisdiction of the parties and of the subject-matter.

2. **CONTEMPT**—*how proceeding in, entitled.* A contempt order is properly entitled in the name of The People, although it is a civil contempt.

3. **MUNICIPAL CORPORATIONS**—*when village board cannot affect status as to indebtedness by resolution.* A board of trustees of a village cannot legally rescind a resolution declaring an indebtedness to a third party without the consent of such third party after such resolution has been accepted by him.

Mandamus. Appeal from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907. Affirmed. Opinion filed October 20, 1908.

F. M. WILLIAMS and F. C. STRUCKMEYER, for appellant.

FRED H. ATWOOD, FRANK B. PEASE and CHARLES O. LOUCKS, for appellee.

MR. PRESIDING JUSTICE SMITH delivered the opinion of the court.

The Circuit Court in a proceeding for a writ of *mandamus* against appellant, O. B. Munger, as president of the Village of Berwyn, entered an order February 6, 1907, directing a writ of *mandamus* to issue as prayed for in the amended and supplemental petition. On March 1, 1907, the writ was issued commanding appellant Munger forthwith to sign three warrants for \$90 each in favor of John W. Burdette in payment of his salary as village superintendent for the months of May, June and July, 1906, and to deliver said warrants forthwith to said Burdette. The writ was subsequently served by the sheriff upon appellant Munger by reading the same to him and delivering to him a copy.

Appellant Munger failed to comply with the judgment and writ and on motion, based on an affidavit, due notice of the motion having been given, the Circuit Court entered a rule on Munger to show cause why he should not be punished for contempt of court for failing to comply with the writ of *mandamus*.

Appellant filed an answer to the rule to show cause wherein the sufficiency of the writ of *mandamus* and the order for the same is questioned. Subsequently, by leave of court, appellant filed a supplemental answer in which he represents to the court that on April 10, 1907, the board of trustees of the village of Berwyn adopted a resolution rescinding and revoking the resolutions of June 19, July 3 and August 6, 1906, directing and authorizing the president and clerk of the village of Berwyn to draw the warrants named in the petition and writ of *mandamus*. The answer further

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set up that the warrants referred to in the resolution and in the writ of *mandamus* are identical; and that the action of the board of trustees in rescinding and reversing its previous resolution was a matter for their proper legislative determination, and that by the adoption of the later resolution appellant was deprived of the power to sign the warrants mentioned in the writ. Appellant in his answer disclaims any intention of contumacious conduct toward the court and prays that the rule entered against him be discharged.

On April 30, 1907, an order was entered, entitled "People of the State of Illinois v. O. B. Munger," which recites that this cause came on to be heard upon the rule issued to show cause and upon answer to the rule; and the court having heard the evidence finds that the writ of *mandamus* was duly served upon the respondent O. B. Munger by the sheriff of Cook county, and that the respondent failed and refused to comply with the writ; that a certified copy of the rule to show cause was served upon said Munger and that he persists in his refusal to comply with said writ and has failed to purge himself of said contempt; and adjudges said Munger is guilty of contempt of the court in failing to obey said writ, and that he be imprisoned in the county jail of Cook county for the period of seven days, or until he shall comply with said writ of *mandamus*.

From this order appellant prosecutes this appeal.

The main question before the court on this appeal is the sufficiency of appellant's answer to the rule to show cause.

The trial court had jurisdiction of appellant Munger, and of the subject-matter of the petition. It therefore had full authority to render the judgment for a peremptory *mandamus*. The judgment was final, and no appeal or writ of error was prosecuted to reverse it. The formality of that order or the merits of the case cannot be questioned in this proceeding.

Leopold v. People, 140 Ill. 557; Clark v. Burke, 163 *id.* 334; Swedish American Tel. Co. v. Casualty Co., 208 *id.* 562.

The contempt order was properly entitled in the name of the People, although it was a civil contempt. People v. Didrich, 141 Ill. 670; Lester v. The People, 150 *id.* 426; Hannah v. The People, 198 *id.* 77; Glay v. The People, 94 Ill. App. 598. As was said in Stearns v. Joy, and Same v. The People, 41 Ill. App. 157, quoting from Winslow v. Nayson, 113 Mass. 411-420: "The contempt proceeding is really but an incident to the principal cause, and all the papers relating to it should be filed with the other papers in the case." The court in that case cites Sercomb v. Catlin, 128 Ill. 556, a proceeding entitled in the name of the receiver in which the defendant was adjudged guilty and the judgment was affirmed, and then proceeds to say: "This objection seems rather immaterial here as appellant was held upon proceedings before the court; and by its order an additional title was there given to the action."

We think the record shows sufficiently that the failure of appellant to sign and deliver the warrants injured appellee.

In our opinion the board of trustees of the village of Berwyn could not rescind legally in 1907 the resolutions passed in 1906, which declared the village of Berwyn indebted to appellee for services rendered and ordered warrants to issue to appellee therefor without the consent of appellee after he accepted the action of the board. McConoughey v. Jackson, 101 Cal. 270. The rescinding action of the board of trustees did not therefore excuse appellant from obeying the peremptory writ. His duty was to obey the writ, or procure a reversal of the judgment. This court cannot justify him in refusing to be guided by the resolution of 1906, and the judgment of the court, and uphold him in obeying the resolutions of 1907, contrary to the judgment of the court while it remained in full force and effect.

Wolf v. Powers, 144 App. 168.

People *ex rel.* v. Salomon, 54 Ill. 44; Am. & Eng. Enc. (2nd Ed.) Vol. 7, p. 73.

Finding no error in the record, the judgment of the Circuit Court is affirmed.

Affirmed.

Mr. Justice CHYTRAUS took no part in the decision of this case.

Harry Wolf, Appellee, v. O. M. Powers, Appellant.

Gen. No. 14,139.

1. PLEADING—*what question cannot be submitted to jury for determination.* The construction of a contract is a question of law for the court and it is improper to submit the determination of such a question to the jury.

2. PRACTICE—*what proof not essential to assessment of damages.* A default admits the material allegations of the declaration and proof thereof is not essential upon a proceeding to assess damages.

Assumpsit. Appeal from the Superior Court of Cook county; the Hon. AXEL CHYTRAUS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907. Affirmed. Opinion filed October 20, 1908.

Statement by the Court. Appellee, Harry Wolf, brought suit against Arthur N. Powers and appellant, O. M. Powers, upon the following contract between appellee and Arthur N. Powers.

“Memorandum of Agreement by and between Arthur N. Powers and H. Wolf, both of the City of Chicago and State of Illinois.

Whereas, Arthur N. Powers has this day sold to H. Wolf Four Hundred (400) shares of the capital stock of the National Fiber & Cellulose Company, of Ten (\$10) Dollars each, for Two Thousand (\$2,000) Dollars cash, the payment of which to said Powers is evidenced by a receipt signed by him for said amount and delivered to said H. Wolf, which said Four Hundred (400) shares of stock is to be held by said H. Wolf

until taken up and exchanged for Twenty-one (21) shares of common stock of One Hundred (\$100) Dollars each, and Twenty-one (21) shares of six per cent. non-cumulative preferred stock of One Hundred (\$100) Dollars each, in the American Corn Fiber Company, which said American Corn Fiber Company is now incorporated for the purpose of acquiring all of the property, both real and personal, of whatsoever kind and nature, of the National Fiber & Cellulose Company.

The purchase of said stock by said H. Wolf, and the sale thereof by said A. N. Powers, is made upon the following conditions: If at any time between ninety (90) days after date and November first, 1906, the said H. Wolf shall need the said Two Thousand (\$2,000) Dollars, and because of said needs it shall be imperative that he sell and dispose of said shares of stock, then, and in such event, he hereby agrees that before offering said stock to any other person whatsoever, he will serve a sixty (60) day notice upon the said A. N. Powers, requesting him to take up all of said stock for exactly the same sum now paid therefor, to-wit: Two Thousand (\$2,000) Dollars, and in consideration of this sale now made, the said A. N. Powers hereby expressly agrees to accept said notice, and will, within the sixty (60) days provided in said written notice, take up all of said shares of stock, and repay to said H. Wolf the sum of Two Thousand (\$2,000) Dollars.

Signed, sealed and delivered in duplicate this thirty-first day of January, A. D. 1905.

ARTHUR N. POWERS, (SEAL)
HARRY WOLF. (SEAL)

Witness:

E. H. SCHIFF.

In the event that the sixty (60) day notice mentioned in the foregoing agreement is served upon my nephew, Arthur N. Powers, and he fails to take up said stock, I hereby agree to take up said stock and pay therefor the sum of Two Thousand (\$2,000) Dollars.

O. M. POWERS. (SEAL.)”

Appellant filed a plea denying joint liability with Arthur N. Powers. Appellee thereupon, by leave of

court, discontinued the suit as to Arthur N. Powers, and filed an amended declaration consisting of two counts. Demurrers were sustained to the first count, and an amended first count and three additional counts were filed, to which appellant demurred. The demurrers were overruled and appellant filed seven special pleas.

Appellee demurred to the first five pleas, but did not join issue on the sixth and seventh pleas. The demurrers to the five pleas were sustained, and appellant elected to stand by his pleas. He also moved to carry the demurrers back to the second count of the amended declaration, and to the second and third additional counts. This motion was overruled.

On motion of appellee default was entered against appellant for failure to further plead to the amended first count of the amended declaration, and to the first additional count. The court heard the evidence offered on behalf of appellee, appellant objecting, and assessed appellee's damages at \$1,059.58, to which exception was taken. Judgment was entered on the finding and appellant excepted thereto.

MILLARD R. POWERS, for appellant; JOSIAH BURNHAM, of counsel.

FOSTER, BRADLEY & STETSON, for appellee.

MR. PRESIDING JUSTICE SMITH delivered the opinion of the court.

Appellant assigns errors upon the rulings of the court sustaining demurrers to his pleas, and refusing to carry appellee's demurrers back to the counts of the declaration, entering default, and assessing damages and entering judgment; and also, in admitting evidence.

The ground of the demurrers to the first count of the amended declaration and to the first, second and third additional counts was the failure to allege that the

notice served by the plaintiff, appellee, was in writing, as required by the contract set up in the declaration.

In ruling upon the special demurrers to the counts of the declaration the trial court necessarily passed upon the question whether the contract between Wolf, appellee, and Arthur N. Powers provided for a notice in writing to Powers "requesting him to take up all of said stock for exactly the same sum of money now paid therefor," etc. No count in the declaration averred that a written notice was served. If the contract requires a written notice each count in the declaration is defective in failing to make such averment. This is the principal question presented in argument before us.

In support of the construction contended for by appellant "that the contract provided for a written notice" reliance is placed upon the language of the contract which required appellee Wolf to "serve a sixty (60) day notice upon the said A. N. Powers," etc., and "the said A. N. Powers hereby expressly agrees to accept said notice and will within the sixty (60) days provided in said written notice, take up all of said shares of stock," etc. It is also urged that the contract and the guaranty thereof are under seal, and in the most solemn form that could be adopted, and therefore the notice was to be equally formal; that the words "serve" and "accept" "said written notice" all refer and relate to the one notice which was to be given under the contract, and that the notice to be given was to be of such a character that it could be served and accepted as those words are commonly understood.

Upon the best consideration of the contract and the arguments of counsel which we have been able to give, we are inclined to the opinion that the construction of the contract adopted by the trial court is the correct one. As we read and understand the contract, Wolf agreed to give to Powers a sixty day notice before offering the stock to any other person, in the event

named in the contract. The contract does not in terms provide that this notice should be in writing. No good reason is apparent why an oral notice could not be "served" and "accepted" as well as a written notice, or that it would not serve the purpose of the parties as expressed in the contract as well as a written notice. When the parties have failed to express in their contract the kind of notice, whether in writing or oral, it must be presumed that they did not regard it as material or important, and courts ought not to read into the contract what the parties have not written therein, especially when, in the nature of the case, it is unimportant and immaterial. In the view we take of the contract the notice provided for therein, and its acceptance, might be oral or written, consequently the reference to "said written notice" in the last clause of the contract has no special significance in determining the question we are now considering. It refers simply to the notice provided for in the contract, and was not intended to and does not affect the kind of notice or the manner of giving it. In our opinion, therefore, the court did not err in the rulings upon the demurrers to the declaration.

The pleas demurred to and held bad by the court did not directly deny the allegations of the counts which they purported to answer, but alleged that the notice required by the contract was a written notice, and that the liability of the defendant upon said contract of guaranty was wholly dependent upon the service by the plaintiff of a written notice, etc. These allegations are mere conclusions of law drawn by the pleader and not statements of fact. Appellant by the pleas attempted to submit to the jury as a question of fact whether or not a notice in writing was required by the contract. The construction of a contract is a question of law for the court, not a question of fact for the jury. The demurrers to the pleas were properly sustained.

It is further urged that the testimony offered on

the assessment of damages, after the default was entered against appellant for failure to further plead to the amended first count of the amended declaration and to the first additional count, was insufficient in that it does not show, as provided in the contract, that appellee "shall need the said \$2,000 and because of said needs it shall be imperative that he sell and dispose of said shares of stock."

The declaration averred that on the 19th day of October, 1905, "the plaintiff was in need of the \$2,000 so paid to Arthur N. Powers and because of said needs it became imperative that he sell," etc.

In *Cook v. Skelton*, 20 Ill. 107, the court, at page 111 of its opinion, says: "The default admitted every material allegation in the plaintiff's declaration and left nothing but the assessment of damages open to be determined. When the court came to assess the damages, the only issue it could then try was, the amount of damages in the case, and any other issue was not before the court. The indebtedness was admitted but the amount had to be ascertained by the inquiry."

In *Shinn's Pleading & Practice*, Vol. 2, page 980, it is said: "The defendant by permitting a default to be entered against him admits every fact alleged in the declaration."

Appellant cannot complain that the evidence of facts admitted of record was insufficient or did not support the essential averments of the declaration.

We think that *Morton v. Bailey*, 2 Ill. 213, and *Foreman Shoe Co. v. Lewis*, 191 Ill. 155, dispose of the objections made on behalf of appellant to the evidence offered on the inquest.

In our opinion the record is free from reversible error, and the judgment is therefore affirmed.

Affirmed.

Mr. Justice CHYTRAUS took no part in the decision of this case.

**Thomas M. O'Shaugnessy, Appellee, v. Chicago City
Railway Company, Appellant.**

Gen. No. 14,151.

1. **VERDICT**—*when not set aside as against the evidence.* A verdict will not be set aside on review as against the weight of the evidence unless palpably so.

2. **VERDICT**—*when not excessive.* A verdict for \$1,500 rendered in an action for personal injuries is not excessive where it appears that the plaintiff as a result of the accident in question received an injury to his hand, was incapacitated to labor as a result of the injury and suffered pain.

3. **EVIDENCE**—*when objection to question calling for expert opinion properly sustained.* If a witness under cross-examination has testified to the facts as he saw or remembered them and has not qualified as an expert and has given no testimony showing any peculiar experience relative to the subject-matter of the inquiry, an objection to a question as follows, is properly sustained: "When you are riding on a grip-car, can you tell when the cable is released without seeing it done?"

4. **EVIDENCE**—*when refusal of court to strike out answer as conclusive not ground for reversal.* Notwithstanding an answer should have been stricken out as the statement of a conclusion, the refusal of the court to strike out the same is not ground for reversal unless prejudice appears.

5. **EVIDENCE**—*what attending physician may properly testify to.* In an action for personal injuries the attending physician of the plaintiff may properly testify that there was numbness of the fingers of the plaintiff, where such physician further shows by his testimony that he was not making such statement purely from declarations made to him by the plaintiff.

6. **EVIDENCE**—*when objection to hypothetical question properly sustained.* In the absence of a foundation of facts being contained in the record, an objection to a hypothetical question is properly sustained.

7. **EVIDENCE**—*when question improperly calls for conclusion and invades province of jury.* A question as follows is subject to the objection that it calls for a conclusion and invades the province of the jury: "You may state what the driver was doing, how he was driving, as to whether or not he apparently intended to drive across the track."

8. **INSTRUCTIONS**—*when containing abstract proposition of law not misleading.* An instruction is not prejudicially misleading which tells the jury "neither by these instructions nor by any words uttered or remark made by the court during this trial, does or did

the court intimate or mean to give, or wish to be understood as giving, an opinion as to what the proof is or what it is not, or what the facts are or what are not the facts therein."

Action in case for personal injuries. Appeal from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907. Affirmed. Opinion filed October 20, 1908.

WEST, ECKHART & TAYLOR and WILLIAM ROTHMANN,
for appellant.

WEISSENBACH & MELOAN, for appellee.

MR. PRESIDING JUSTICE SMITH delivered the opinion of the court.

Appellant prosecutes this appeal to reverse a judgment of the Superior Court against it in favor of appellee, for personal injuries sustained by him March 24, 1905.

On that date appellee, then a boy between twelve and thirteen years of age, boarded a southbound State street cable train of appellant at the intersection of Adams and State streets. He took a seat on the front seat of the grip car on the east or left hand side of the car. A man named Brackett was in the same seat with him on the end or outside of the seat, appellee being on the inside. As the train approached the intersection of Sixteenth and State streets it collided with a wagon belonging to the Paepcke-Leicht Lumber Company, drawn by two horses, and in charge of a driver, which was being driven out of Sixteenth street across the tracks of appellant in a northeasterly direction. By the collision the dashboard on the front end of the grip car was bent back and appellee's right hand was caught and injured.

The declaration consists of three counts. The first count avers that while a certain car of appellant was running in a southerly direction along State street at or near the intersection of Sixteenth street appellant, by its servants, so carelessly and negligently drove and

managed the said car that it ran into and struck with great force and violence a certain wagon, whereby the plaintiff, who was in the exercise of due care for his own safety, was injured.

The negligence of appellant averred in the second count is the failure to "keep a proper lookout that the said car should not strike against and collide with wagons and other vehicles upon said street," by reason whereof the car with great force and violence ran into and struck against a certain wagon, etc.

The third count alleges that "the defendant did not use due and proper care that the plaintiff should be safely and securely carried; that while the driver of the car was looking in a direction other than along the railroad track of the defendant in front of and ahead of said grip car, said grip car with great force and violence ran into and struck a certain wagon," etc.

Appellant pleaded the general issue. The record in this case shows no controversy as to the following facts: On March 24, 1905, appellee, a boy, not quite thirteen years of age, was a passenger on a south-bound State street cable train owned and operated by appellant, and that he was sitting on the front seat of the grip car near the east side of the car; that at or near the intersection of Sixteenth and State streets the car collided with a wagon and that appellee suffered the injury complained of in the declaration in and as a result of the collision; and that appellee was not guilty of contributory negligence. The question of fact, therefore, for the trial court and jury to determine was as to the negligence of appellant.

The testimony bearing upon this question was conflicting. A large number of witnesses, including the plaintiff, testified to various circumstances in connection with the accident. They say that when they first saw the horses and wagon in question the train was then from thirty to sixty-five feet distant from the point where the collision occurred. One witness,

Wardenski, the teamster in charge of the team and an employe of Paepcke-Leicht Lumber Company, put the distance at 300 feet. Eight witnesses, including the plaintiff and three of his witnesses, stated the distance as sixty feet or less.

The speed of the train at the time the team was first seen crossing the track is variously stated by the witness as the ordinary or regular rate of speed, "full" speed, "not full speed," "half speed," and at five or six, six or seven, and eight or nine miles per hour. The horses were walking.

There was some conflict as to whether or not the gripman rang his bell. The plaintiff and two other witnesses testified that no bell was rung. Wardenski said he did not hear a bell rung. Six witnesses for the defendant testified that the bell was rung. The witnesses differed as to the point where the gripman released the cable. The gripman testified that he released the cable at a point between Fifteenth street and the Illinois Central Railroad crossing, which is placed by the witnesses at from fifty to three hundred feet north of Sixteenth street; and that from that time on he did not have a tight hold on the cable. He further said that when he first saw the horses their heads were twelve to fourteen feet from the track. "At that time he did not think the driver was going to try to drive across the track ahead of us. The car was about sixty feet away." He testifies that when he became aware that the driver intended to cross the track ahead of him, the horses were about five feet from the track and the train twenty feet from the horses. There is testimony that the gripman, upon seeing that the driver intended to cross the railroad track, at once applied the brake and sanded the track. One enthusiastic witness, Nolan, says "he reversed his power" which would be a somewhat difficult feat to accomplish at that distance from the power plant of a cable system. There is testimony on the other hand that the gripman was looking to the west, not along the track

and had his hand upon the lamp; that he made no attempt to check the car, and appeared to be excited.

The evidence shows that the southeast corner of the grip-car struck the wagon either on the rear wheel or between the front and rear wheels. The accident happened about noon. The day was cloudy. The surface of the street and rails was wet and muddy. The wagon was pushed off the track, but was practically uninjured. The front part of the dashboard of the car was broken or bent inward or backward, and the car itself was derailed by the horses and wagon, pulling it off the track, it is claimed.

It is urged on behalf of appellant that the cause should not have been submitted to the jury; that there was no evidence before the jury on which it could find the defendant guilty of negligence, without acting unreasonably in the eye of the law.

In our opinion, however, there was evidence before the jury tending to prove the negligence of appellant averred in the declaration. The evidence introduced on behalf of appellee standing by itself, if believed by the jury, would warrant a verdict finding appellant guilty of the negligence averred. The motions of the defendant to instruct the jury to find for the defendant were, therefore, properly overruled.

It is apparent, we think, from the record that there is a great conflict in the testimony of the witnesses relative to the question of appellant's negligence. It is impossible to reconcile the evidentiary facts testified to by the witnesses upon any theory of the case. The reasonableness or unreasonableness of the testimony of the several witnesses, their interest or lack of interest in the case, their respective situations and opportunities to observe, and their manner of testifying and their intelligence, were all matters for the consideration of the jury in determining the weight and value of their evidence. Upon a review of the evidence we cannot say that the verdict is palpably against the

weight of the evidence and should be set aside for that reason.

On the trial appellant's counsel asked the plaintiff, who had testified on direct examination that when he first saw the wagon the car was then about forty or fifty feet away, and had repeated the statement on his cross-examination, the following question: "Q. How far would you say it is from where you are sitting to the end of that room (indicating the end of the court room)?" The court sustained an objection to the question. We think the ruling was not erroneous.

Dr. Hensler had treated appellee's hand for a period of six months and was a witness on the trial. On cross-examination appellant's attorney asked him the following question: "Q. He has got a pretty good hand, hasn't he?" Without waiting for an objection from plaintiff's attorney the court said: "The jury can determine that." This was not reversible error, in our opinion.

Witness Lemon, on his direct examination, testified that the gripman of the car shouted "hey there" and did nothing else. He also said the car struck the rear wheel of the wagon. On the cross-examination of this witness appellant's attorney put this question: "Q. When you are riding on a grip-car, can you tell when the cable is released without seeing it done?" An objection to this question was sustained by the court. The witness had testified to the facts as he saw and remembered them. He had not qualified as an expert, nor was his testimony based on any experience relative to the subject-matter of the question. We think the ruling of the court was not erroneous.

In our opinion, the statement of the witness Bailey that "the gripman could not have made any attempt to stop the car anyway, the way the car was going at full speed," should have been stricken out as it was evidently his conclusion, but we do not think the refusal to strike it out is reversible error.

It is urged that Dr. Hensler's testimony that "there

is a numbness of the fingers," should have been stricken out for the reason that he was testifying to a purely subjective condition, not discoverable by a physician except from statements made by the patient.

The doctor's testimony shows that he treated appellee's hand from March to the following September. On cross-examination appellant's attorney asked the witness: "Q. Is there anything apparent besides the scars?" After enumerating several things the witness said that the hand was large and blue, and showed that the circulation of blood in the hand was very poor and that there was a numbness of the fingers. In our opinion the court properly refused to strike out the statement of the witness, for the reason that he was the attending physician and could therefore testify to all that he discovered in the course of his treatment.

The record shows no exception taken to the ruling of the court, while Dr. Burland was being examined, permitting the witness to refresh his recollection from entries in his book made at the time of treatment of appellee's injury, and permitting the witness to read from his memorandum. The ruling is not presented, therefore, for review.

No foundation for the hypothetical question put to the witness, Dr. Sweeney, is pointed out to us in the record, and we find no evidence on which to base it. The facts are not referred to in the question. The court, therefore, properly sustained an objection to the question.

Counsel for appellant put to Dr. Small, a witness called by appellant, the following question: "Q. Did you see anything about the hand that in your judgment ought to impair its usefulness in any way?" The court sustained an objection to the question. The witness subsequently answered the question without objection whether he observed anything "which in his judgment does impair the usefulness of the hand." If there was any error in the ruling upon the question

it was harmless, for appellant secured from the witness his opinion in substance on the question of the impaired usefulness of the hand.

We think the court did not err in striking out the answer of the witness Nolan to the question: "Q. You may state what the driver was doing, how he was driving, as to whether or not he apparently intended to drive across the track?" The last clause of the question, to which the witness responded in his answer, called for the conclusion of the witness. It was for the jury, not the witness, to draw its conclusions from the facts.

Our attention is directed to remarks made by the court in the presence of the jury during the progress of the trial, which it is claimed were calculated to influence the jury against appellant and were prejudicial to it. We have carefully considered the remarks referred to, and we are of the opinion that they do not constitute reversible error.

Considering the age of appellee, the injury to his hand and the time he was incapacitated as the result of the injury, and the pain and suffering shown by the evidence, we cannot say that the verdict and judgment of \$1,500 is excessive in amount.

The second instruction given at the request of the appellant is as follows:

"You are further instructed that a street railway company as a carrier of passengers is held by the law to the use of highest degree of care consistent with the practical operation of its railroad and is bound to do all that human care, vigilance and foresight can reasonably do, consistent with the mode of conveyance, the practical operation of its railroad and the exercise of its business as a carrier."

While counsel for appellant concede that the instruction states a correct rule of law, it is contended that because no application is made of the rule to the facts in this case, the giving of the instruction was prejudicial to appellant, for the reason that impliedly

O'Shaugnessy v. Chicago City Ry. Co., 144 App. 174.

it assumes the existence of material facts in the controversy. It is insisted that by this instruction the jury were given to understand, and no doubt did understand, that appellant failed to use "the highest degree of care" and that it did not do all that "human care, vigilance and foresight can reasonably do."

In *Chicago City Ry. Co. v. Smith*, 226 Ill. 178, this instruction in substance was approved as announcing an abstract rule of law correctly. In slightly different phraseology the instruction has often received the sanction of the Supreme Court of this state. But the identical objection here made to the instruction has not been presented to the Supreme Court, so far as we are advised, in this kind of a case, and where, as in this case, the instruction was one of a series of instructions which cover the question of the burden of proof, the credibility of witnesses, the theory of the defendant's case, the duty of the jury to consider the case in all its bearings the same as they would if the case involved a controversy between private citizens, the duty of the jury, if they believe the careless or unskillful manner of driving the wagon was the sole cause of the injury, to find the defendant not guilty, the necessity of proof that the defendant was negligent in the running, management and operation of the car in the manner alleged in the declaration before the plaintiff can recover, that "neither by these instructions nor by any words uttered or remark made by the court during this trial, does or did the court intimate or mean to give, or wish to be understood as giving, an opinion as to what the proof is or what it is not, or what the facts are or what are not the facts therein." Considering the instruction as one of the series of instructions given, we do not think it is open to the objection here made, or that by the giving of the instruction any facts were assumed or the jury could so understand it. If it had no tendency to mislead the jury, as we think it did not, the fact that it states an abstract proposition of law does not make it

erroneous. *Parmelee Co. v. Wheelock*, 224 Ill. 194. In *Chicago City Ry. Co. v. Shreve*, 226 Ill. 530-539, the court say: "It has been repeatedly held by this court that where an instruction does not direct a verdict, or amount to such direction, it may be supplemented by other instructions in the case, and that where, in such case, the instructions when considered together and as a whole correctly state the law upon a given subject, an omission in any one instruction in the series will be cured if the instructions, as a series, are correct. (*Pardridge v. Cutler*, 168 Ill. 504; *Montgomery Coal Co. v. Barringer*, 218 *id.* 327)."

When this instruction is read in connection with instruction No. 14, given at the request of appellant on the same subject, it is not conceivable that the jury could have understood that the court intended to tell them that the defendant had failed to use the highest degree of care, etc.

In our opinion the record is free from reversible error, and the judgment of the Superior Court is affirmed.

Affirmed.

Mr. Justice CHYTRAUS took no part in the decision of this case.

Leopold Sonnenschein, Appellee, v. Max Malter Company, Appellant.

Gen. No. 14,116.

1. **PRINCIPAL AND AGENT**—*what evidence not competent to establish relation of.* Evidence of the declarations of an agent is not admissible against his principal for the purpose of proving or enlarging his authority.

2. **ASSUMPSIT**—*when account does not become stated.* Failure to return or object to an account rendered is not evidence that the same has become stated, where the question at issue is as to whether or not the plaintiff has sold any goods to the defendant.

Sonnenschein v. Max Malter Co., 144 App. 133.

Assumpsit. Appeal from the Superior Court of Cook county; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907. Reversed and remanded. Opinion filed July 14, 1908. Rehearing denied July 29, 1908.

ISRAEL SHRIMSKI and BLUM & BLUM, for appellant.

ISRAEL COWEN, for appellee.

MR. PRESIDING JUSTICE BAKER delivered the opinion of the court.

This is an appeal by the defendant from a judgment for \$380.50 recovered for the price of liquors alleged to have been sold and delivered by plaintiff to the defendant between December 8, 1904, and February 25, 1905.

The defendant is an Illinois corporation organized to carry on the business of buying and selling butter, eggs, cheese and other produce, and its principal place of business has at all times been in Chicago. The evidence tends to show that the defendant corporation rented a store room at Hammond, Indiana, and opened a store therein for the purpose of selling produce, and put one Mike Malter in charge of said store; that Mike Malter had no authority to buy goods of any kind for defendant or to pay any bills of defendant; that all purchases for defendant were made in Chicago and all bills of defendant paid by check at the Chicago office; that Mike Malter sublet a part of said store room to one David Malter; that David Malter sold liquors from a wagon and used the part of the store so rented by him for a store room for his liquors.

The orders for the liquor were given, some by Mike Malter and some by David Malter, to Reuben, a salesman of the plaintiff, at the defendant's store in Hammond. The sellers were directed to ship some of the liquor so ordered to defendant at Hammond and some to David or D. Malter. Some time in February, 1905, the defendant company ceased to do business at Ham-

mond and removed its property then in said store to Chicago.

The contention of the defendant was that Mike Malter had no authority to buy liquors for the defendant; that the defendant never received any of the liquors in question and was not liable to the plaintiff for the price or value of said liquors. Neither Mike Malter nor David Malter was called as a witness. Reuben, the salesman, was permitted to testify for the plaintiff, over the objection of the defendant, that at the time he took the first order from Mike Malter at Hammond, said Mike Malter said to him, "I am one of the firm. I want to speak to you about business; we want to put in a stock of liquors and want thirty to sixty days." Other evidence of statements by Mike Malter that he was a member of the firm was given over the objection of the defendant, and a motion to strike out the evidence of Mike Malter's statement was overruled.

Evidence of the declarations of an agent are not admissible against his principal for the purpose of proving or enlarging his authority. *Mechem on Agency*, sec. 100; *Mer. Nat. Bank v. Nichols*, 223 Ill. 49.

The evidence of the declarations of Mike Malter was, under the issues in this case, in our opinion, not admissible to prove that Mike Malter had authority to buy for defendant the liquors in question.

The court gave for the plaintiff the following instruction:

"The jury are instructed that it is the law that where the true owner of property holds out another, or allows him to appear as the owner, or as having full power of disposition over certain property, and thereby innocent third parties are led into dealing with such apparent owner or person having such apparent power of disposition, the law will protect such innocent third party."

The question in this case was not as to the appar-

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ent authority of Mike Malter over the property of the defendant in the store of the defendant at Hammond, but was as to his authority to buy liquors for the defendant. The doctrine applicable to an innocent purchaser of property from one who has possession thereof, with apparent authority to sell the same, has no application to the facts of this case.

The court also gave for the plaintiff the following instruction:

“The jury are instructed that if they believe from the evidence that the plaintiff, on the strength of the defendant having a place of business at Hammond, Indiana, opened an account with said defendant and sold and delivered goods to the same and rendered bills from time to time, and said bills were received and never returned or corrected by defendant within ‘a reasonable time’ as defined in these instructions, such retention is evidence of an account stated or settled account and may be regarded as conclusive between the parties unless fraud, mistake, omission or inaccuracy is shown.”

It is only in case that goods have been sold by one person to another that an account rendered becomes an account stated unless objected to within a reasonable time. In this case the issue was whether the plaintiff had sold any goods to the defendant, and the instruction therefore should not have been given.

For the errors indicated the judgment will be reversed and the cause remanded.

Reversed and remanded.

Stanislaw Ziolkowski, Appellee, v. Ira M. Cobe, Receiver, Appellant.

Gen. No. 14,067.

1. APPEALS AND ERRORS—*when judge without power to sign bill of exceptions. A bill of exceptions presented for signing and sealing after the judgment term and after the time fixed for presentation cannot properly be signed and sealed.*

2. **AMENDMENTS AND JEOPAILS**—*what essential to amendment after term.* In order to amend after the judgment term an order providing for a bill of exceptions fixing a longer period therefor than that provided in the order as written up, there must be some matter of record or *quasi* record to support the amendment; stenographic notes, etc., do not satisfy the rule.

Action in case for personal injuries. Appeal from the Superior Court of Cook county; the Hon. SAMUEL C. STOUGH, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907. Affirmed. Opinion filed October 20, 1908.

Statement by the Court. This is an appeal by the defendant from a judgment for personal injuries recovered in the Superior Court. Appellee moved to strike the bill of exceptions from the record, and his motion was reserved to the hearing. The judgment was entered June 29, 1907. The following is the concluding portion of the judgment order as then entered:

“Whereupon the defendant having entered his exceptions herein prays an appeal from the judgment of this court to the Appellate Court in and for the First District of Illinois, which is allowed upon filing his appeal bond herein in the sum of \$5,000.00, to be approved by the clerk of the court within thirty days from this date, and leave given said defendant to file his bill of exceptions herein within *thirty* days from this date.”

The bill of exceptions was filed in the Superior Court August 6, 1907. The concluding portion thereof is as follows:

“The defendant tenders this, his bill of exceptions, and prays that the same may be signed and sealed by the judge of this court; which is done accordingly this 1st day of August, A. D. 1907;” and then follow the signature and seal of the trial judge.

January 9, 1908, defendant, on notice to plaintiff, presented his motion in writing in the Superior Court before the judge who had presided at the trial: “to correct the record in said cause as to an order entered

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June 29, 1907, by which defendant was allowed sixty days in which to present his bill of exceptions, which order was erroneously entered so as to show the allowance of thirty days for that purpose, and that such order be entered *nunc pro tunc* as of June 29, 1907." The order entered January 9, on said motion, states that said trial judge, after an examination of said bill of exceptions and the "notes and transcript of the proceedings in said cause on June 29, 1907, in the matter of the defendant's motion for a new trial, made by W. A. Lindsay, a court reporter, who reported the said proceedings, and of the files, papers and exhibits filed therein and introduced in evidence in said cause and made a part of the record therein, and the examination of other proper memoranda in said cause, and the court being fully advised in the premises, the said judge hereby certifies, from his examination of the foregoing, the said bill of exceptions, transcript of said proceedings, said files and papers, and from his own knowledge and recollection, that when on June 29, 1907, he entered judgment on the verdict in said cause, from which judgment an appeal to the Appellate Court of Illinois for the First District was prayed by the defendant and allowed by the court, that he, the said judge, fixed the time for the defendant to file his appeal bond at thirty days, and for presenting his bill of exceptions at sixty days thereafter, and then and there so ordered, and that by error of the clerk of said court the order was erroneously entered showing the time allowed the defendant for presenting his bill of exceptions at thirty days instead of sixty days, as was the actual order of the court, and therefore on motion of the defendant's counsel it is ordered that the record of this court be and hereby is corrected and amended so as to state the facts by correcting and amending the record of the order heretofore entered in reference to the time allowed the defendant to present his bill of exceptions so as to read as follows, to-wit: 'Whereupon the defendant having entered

his exceptions herein, prays an appeal from the judgment of this court to the Appellate Court in and for the First District of Illinois, which is allowed upon his filing his appeal bond herein in the sum of \$5,000, to be approved by the clerk of this court, within thirty days from this date, and leave given defendant to file his bill of exceptions herein within sixty days from this date,' to which order the plaintiff by his attorney objects and excepts.

It is further ordered, adjudged and decreed that this order shall be entered and this amendment shall take effect *nunc pro tunc* as of June 29, A. D. 1907."

The bill of exceptions taken by the defendant of the proceedings on said motion shows that the court had before it said original bill of exceptions, the transcript of the record of the court therefore filed in this court, the affidavit of Mr. Busby and the affidavit of W. A. Lindsay, the stenographer who reported the proceedings on the motion for a new trial and who attached to his affidavit a transcript declared by him to be a true transcript of the proceedings on such motion.

Both the original bill of exceptions and said transcript attached to Lindsay's affidavit state that the court allowed sixty days for a bill of exceptions at the time the motion for a new trial was overruled.

SHOPE, ZANE, BUSBY & WEBER, for appellant.

FRANCIS J. WOOLLEY, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

The order of June 29, as entered in the record by the clerk, was that the defendant have leave "to file his bill of exceptions herein within thirty days from this date." The bill of exceptions was signed August 1 and filed August 6. It concludes as follows: "The defendant tenders this, his bill of exceptions, and prays that the same may be signed and sealed by the

judge of this court, which is done accordingly this 1st day of August, A. D. 1907." There is nothing on the face of the bill to indicate that it was presented to the trial judge within thirty days from June 29. There is in the record no order that the bill be filed *nunc pro tunc* as of some day within thirty days from June 29. We think that on the record as it was August 1, 1907, the trial judge had then no power or authority to sign the bill of exceptions in said cause.

It is well settled in this state that the record of an order cannot be amended after the close of the term at which it was entered, unless there is some matter of record or *quasi* record in the cause to amend by. That the stenographic notes of Lindsay attached to his affidavit are not such a memorial paper as can be used as a basis of an order to amend a record, was expressly decided in *Hubbard v. The People*, 197 Ill. 15. If we are correct in holding that the trial judge had no power to sign a bill of exceptions on August 1, then the document signed by him on that day is not a bill of exceptions, but only a private memorandum. It was not a part of the record on January 9. It was not then properly a part of the files, because the time allowed for filing a bill of exceptions had expired before it was filed.

In *C., M. & St. P. Ry. Co. v. Walsh*, 150 Ill. 607, the bill of exceptions had been signed and filed within the time limited by the order, and was therefore a part of the record which the court might properly examine on a motion to amend the bill of exceptions.

We think that the court was without power at the January term to enter an order amending the record of the June term, *nunc pro tunc* as of that term, for want of a sufficient official or *quasi* official note or memorandum or memorial paper, preserved as a part of the records of the court, pursuant to law, on which to base the said amendment.

The bill of exceptions will therefore be stricken from the record, and as the only errors assigned are that

the court erred in overruling defendant's motion for a new trial and in entering judgment, it follows that the judgment of the Superior Court must be affirmed. *Bill of exceptions stricken from the record and judgment affirmed.*

Mr. Justice CHYTRAUS took no part in the decision in this case.

H. O. Stone et al., Appellees, v. Albert D. Ferry, Appellant.

Gen. No. 14,124.

BROKERS AND FACTORS—*what essential to recover commissions for effecting exchange.* Before real estate brokers become entitled to a commission for effecting an exchange of property, it must appear that they were the procuring cause of both parties entering into the contract of exchange.

Assumpsit. Appeal from the Municipal Court of Chicago; the Hon. EDWARD A. DICKER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907. Reversed with finding of fact. Opinion filed October 20, 1908. Rehearing denied November 4, 1908.

GEORGE W. HESS and E. R. EDE, for appellant.

JOHN M. CURRAN, for appellee; SIMMONS, MITCHELL & IRVING, of counsel.

MR. JUSTICE BAKER delivered the opinion of the court.

This is an appeal by the defendant from a judgment for \$2,250 recovered in an action of assumpsit for commissions on an exchange of real estate. The case was tried by the court without a jury. Plaintiffs were real estate brokers in Chicago. Defendant lived in Evanston and was the owner of a building in Evanston called the Ridgewood, on which there was a mort-

gage for \$50,000. In October, 1905, he listed said property with plaintiffs for sale or exchange. It is not claimed that an exclusive right to sell or exchange said property was given to plaintiffs, and there is evidence tending to show that defendant authorized Lloyd & Ingersoll to sell or exchange said property for him in September, 1905. November 7, 1906, defendant made an agreement with William G., Junius C. and Ernest D. Hoag, who were the joint owners of a vacant lot in Evanston called the Hoag pasture lot, to exchange with them his said building for their said pasture lot. It is upon the claim of plaintiffs that it was their services that brought about and caused this exchange that the right to recover in this action is based. William G. Hoag lived in Evanston, Junius C. in Chicago, and Ernest D. in California.

Substantially all that was said or done on the part of the plaintiffs in reference to said exchange was said and done by Walter G. Mitchell, one of their salesmen. Mitchell, in March, 1906, proposed to William G. Hoag an exchange of the Ridgewood for a lot other than said pasture lot. This proposition Mr. Hoag refused to consider, but in April he suggested to Mitchell an exchange of the Ridgewood for said pasture lot. He did not make a definite proposition for such exchange, but told Mitchell that he would consider a proposition to exchange the Ridgewood for said pasture lot, and indicated that he would be inclined to accept such proposition.

The testimony of Mitchell and defendant is conflicting as to the report made by Mitchell to defendant of said conversation with Mr. Hoag. We think the court might from the evidence properly find that Mitchell correctly reported to defendant said conversation, correctly stated to him the boundaries of said pasture lot, and that the subsequent conversations between Mitchell and defendant related to an exchange of the Ridgewood for said pasture lot. Mitchell testified that when he reported to defendant his conversation

with Mr. Hoag, defendant said to him, "See what you can do," and further said, "If you do anything with him, bear in mind that it must be cash. I would not consider anything without the cash." I said, "Mr. Ferry, how much cash do you require?" He said, "The minimum amount of ten thousand dollars; the more cash and less vacant you can get, the better."

Soon after this conversation, with the knowledge and consent of defendant, Mitchell took William G. Hoag to defendant's building, and he inspected and examined the same. Mitchell afterwards, at the request of Hoag, procured from the defendant a statement showing facts as to the building, its frontage, equipment, rentals, expenses, encumbrance, etc. Mitchell afterwards suggested to Hoag that as Ferry said that he would have to have some cash, the vacant land be subdivided into lots, and that Hoag retain a part of the lots and put in a certain amount of cash. At this interview Hoag told Mitchell that he was about to go to California, and that he wanted to take the matter up with his brother Ernest, who lived in California, and wanted more details as to the building and a picture of it. Mitchell sent him by mail a copy of the statement above referred to, but was unable to procure a picture of the building. William G. Hoag went to California and returned about the first of July. Both before he went and after his return Mitchell had further conversations with him in reference to said proposed exchange and reported the same to defendant. The substance of what Mr. Hoag said to Mitchell in each conversation after his return from California was that he wanted to take the matter up with his brother Junius C.; that he had tried to have him come out to Evanston for that purpose; that he had been unable to do so; that he would make further efforts to have his brother come out to Evanston, etc.

In September, Lloyd & Ingersoll began their efforts to bring about such exchange. Lloyd went to see Junius C. Hoag in Chicago and made repeated efforts

to secure an appointment with him and William G. Hoag to examine the building. In October he succeeded in making such appointment. Junius C. Hoag went to Evanston, met Lloyd and William G. Hoag and the three made a thorough examination of the Ridgewood. Lloyd procured from defendant's agents a statement of the expenses and income of the building and sent copies to William G. and Junius C. Hoag. It was after all this had been done that the contract for the exchange was entered into. There is no evidence that Mitchell or any one for or on behalf of the plaintiffs had any communication whatever with either Junius C. or Ernest D. Hoag.

It was not enough that through the efforts of plaintiffs, William G. Hoag was induced to enter into said contract for an exchange of the properties in question to entitle plaintiffs to recover from the defendant commissions for making such exchange. They were bound to prove that through their efforts and services Junius C. and Ernest D. Hoag, the other owners, were also caused or induced to make such exchange. This, we think, the evidence fails to prove, and therefore fails to prove that the services or efforts of the plaintiffs were the effective means or procuring cause of bringing about such exchange of properties.

The judgment will therefore be reversed with a finding of facts and judgment will be entered here for the appellant, the defendant in the Municipal Court.

Reversed with finding of facts and judgment here for appellant.

Mr. Justice CHYTRAUS took no part in the decision of this case.

**Solomon Spier, Appellee, v. Douglas Mutual Benefit
& Aid Society, Appellant.**

Gen. No. 14,138.

FRATERNAL BENEFIT SOCIETY—*when expulsion of member illegal.* The expulsion of a member of a fraternal benefit society is illegal if predicated upon the alleged fraud of the member in obtaining money to which he was not entitled where a final judgment establishing his right to the collection of such money has been obtained by him.

Mandamus. Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907. **Affirmed.** Opinion filed October 20, 1908.

Statement by the Court. Appellee filed in his own name a petition against appellant for a writ of *mandamus* commanding appellant to restore him to membership in the defendant society. Defendant filed its answer to the petition, to which petitioners demurred. The court sustained the demurrer and ordered that a writ of *mandamus* issue, and the defendant appealed. The answer avers that the petitioner claimed to be entitled to sick benefits at the rate of \$5 per week during the months of September and October, 1906; sets out the by-laws of the defendant relating to the payment of sick benefits; avers that the petitioner did not comply with the requirements of the by-laws in certain particulars, and avers:

“That, notwithstanding the failure of said petitioner to submit such reports and his obligation to comply with the provisions of the by-laws of the defendant, the said petitioner brought suit against the defendant before Robert L. Campbell, a justice of the peace, having an office at 1159 West North avenue, Chicago, who was publicly known as one of the justices of the peace in Cook county, who always entered judgment in favor of those bringing suits before him; and thereby obtained judgment for fifteen dollars and

Splier v. Douglas Mutual Benefit Society, 144 App. 195.

costs, notwithstanding the attempt made by this defendant to obtain a fair hearing upon the merits of said suit, which judgment the defendant was compelled to and did pay immediately.

“That the petitioner, by such procedure, obtained money from the defendant which was not justly due him; and also caused the impression to be created in the minds of the members and the public that the defendant did not pay its just obligations, and thereby become amenable to the said by-laws, and the penalties therein prescribed. That on December 12, 1906, the defendant served a notice upon the petitioner, a copy of which is set forth in his petition at pages four and five thereof.

“5. That on the 19th day of December, 1906, a trial was duly had before a Trial Committee of Section 2 of the defendant. That the petitioner was present and made no objection to such trial proceeding, but, on the contrary, attempted to defend against such charges, as alleged in said petition. That said Trial Committee reported to said Section 2, adversely to said petitioner, and the membership of said Section 2 thereupon voted to expel the petitioner from the defendant.

“That the petitioner thereupon took an appeal to the Board of Directors of the defendant, which Board ordered said Section to give the petitioner an opportunity to be heard, or to defend himself, upon said charges, and to thereafter take a vote upon the guilt or innocence of the petitioner and the penalty. That such hearing and vote was had; and after the petitioner had appeared and made his defense, a vote was taken by the members of Section 2 which was for the expulsion of petitioner from defendant. That the petitioner did not take any further appeal, or make other objection to the procedure in the defendant society.

“6. The defendant avers that said by-laws were enacted, and were enforced against the petitioner, for the protection of the funds of the defendant from un-

just claims, and were and are reasonable, and were and are necessary for such purpose. That the sum of money so obtained by petitioner was not justly due him; and that by resorting to such procedure and ignoring the provisions of the by-laws of the defendant, the petitioner was able and did perpetrate a fraud upon the defendant and the membership thereof, and that because thereof the defendant took the action above set forth."

CARL A. VOGEL and MILLARD R. POWERS, for appellant.

FRANK F. ARING, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

No objection to the judgment has been made on the ground that the applicant for the *mandamus* was made in the name of the petitioner, and not in the name of The People on his relation.

The grounds of reversal urged are: "because appellee had not exhausted, by appeal, his remedies within the society; and because it appears by the record that the society had jurisdiction over the person of the appellee, the cause of action against him, viz: obtaining money in violation of the statute under which the society was incorporated, and the by-laws of the order, and the fair manner in which he was tried."

The petition avers that petitioner was expelled from the defendant society March 6, 1907, by a vote of the members of section 2. Whether he had a right of appeal from such action to the board of directors depended on whether there was then in force a provision of the constitution or by-laws of the society for such appeal. No such provision of either the constitution or by-laws is set out in the answer, nor is there any averment that any such provision was in force March 6, 1907. The averment in the answer that petitioner

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appealed from the vote taken by this section December 19, 1906, expelling him from the society, and that the board of directors took action on such appeal, cannot be held to amount to an averment that there was in force March 6, 1907, a provision of the constitution or by-laws for an appeal from the action of section 2 to the board of directors. The objection that the judgment is erroneous because appellee had not exhausted by appeal his remedy within the society cannot be sustained.

The judgment of the justice of the peace set out in the answer is an adjudication conclusive upon the defendant that the petitioner was entitled to a sick benefit from the defendant. With that judgment in force we do not think that the defendant society could lawfully expel the petitioner on the ground that by means of such judgment petitioner had obtained money from the defendant which was not justly due to him.

We think the Circuit Court did not err in sustaining the demurrer to the answer and ordering a writ of mandamus to issue, and the judgment will be affirmed.

Affirmed.

Mr Justice CHYTRAUS took no part in the decision of this case.

Julius Brunhild, Administrator, Appellee, v. Chicago Union Traction Company, Appellant.

Gen. No. 14,142.

1. EVIDENCE—*when impeachment of witness proper.* A witness may be impeached by showing inconsistent statements made by him in his testimony at a coroner's inquest, such inconsistent statements being proven by the testimony of a witness who was present and took notes, such witness testifying that from such notes he could refresh his recollection and testify from an independent recollection.

2. INSTRUCTIONS—*when refusal to give instruction as to order in*

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which issues may be considered, not ground for reversal. Held, that it was not prejudicial error for the court to refuse to instruct the jury as follows: "that if under the instructions of the court they find from the evidence that the plaintiff is not entitled to recover, then they will not have occasion to consider at all the question of damages."

3. PLEADING—*when declaration charging collision sufficient after verdict. Held, that the declaration in this case substantially alleged that the defendant negligently ran and operated its car and that as a result of such negligence the plaintiff's intestate, while in the exercise of due care, etc., was struck by said car and so injured that death ensued; that such declaration stated a cause of action and was sufficient after verdict.*

4. PLEADING—*what admitted by general issue. In an action on the case for personal injuries the plea of not guilty does not put in issue the ownership of a street car line or the ownership of the cars operated thereon.*

Action in case for death caused by alleged wrongful act. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907. Affirmed. Opinion filed October 20, 1908.

JOHN A. ROSE and FRANK L. KRIETE, for appellant;
W. W. GURLEY, of counsel.

I. W. FOLTZ, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

In an action on the case brought by appellee against appellant for wrongfully causing the death of plaintiff's intestate, Karl Maika, plaintiff had judgment for \$2,250, and the defendant appealed.

It is insisted that the court erred in permitting Brunhild, a witness called by plaintiff, to testify that Rosengreen, a witness called by defendant, had made a certain statement in his testimony at a coroner's inquest inconsistent with his testimony at the trial.

The distinction between this case and *Overtom v. C. & E. I. R. R. Co.*, 181 Ill. 323, is that in that case a witness who took notes of the testimony of a witness at a coroner's inquest and who testified that he had no independent recollection of such testimony, was per-

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mitted to read, "his translation of so much of his notes to the jury as evidence as was called for." In this case Brunhild testified that he was able to refresh his memory as to what the respective witnesses testified at a coroner's inquest from his notes taken at the time. He then testified that Rosengreen at the inquest made a certain statement; that it was his recollection that Rosengreen made a certain statement. We think the court did not err in permitting Brunhild to so testify.

The refusal of the court to instruct the jury, "that if under the instructions of the court they find from the evidence that the plaintiff is not entitled to recover then they will not have occasion to consider at all the question of damages," was not prejudicial to the defendant. *C. C. Ry. Co. v. Hagenback*, 228 Ill. 290.

The allegations of the third count of the amended declaration, omitting the formal parts, are: "that defendant was possessed of and using and operating a certain street railroad on and along a certain public street commonly called Elston avenue, in said city, in the county and state aforesaid, which said street and the tracks of said street railroad thereon intersect another public street commonly called Fox place, in the said city, in the county and state aforesaid. And this plaintiff avers that said defendant, on the day aforesaid, was possessed of and using and operating on said street railroad a certain car commonly used for the conveyance of passengers for reward and which said car was operated and managed by certain servants in said defendant's employ. And this plaintiff avers that on the day aforesaid the said servants of said defendant did drive said street car southward over and along said street railroad, near and towards said intersection of said Elston avenue and said Fox place, while said Karl Maika, with all due care and caution, was then and there driving a certain wagon northward over and along said Elston avenue, to-wit: near said intersection of said Elston avenue and said Fox place,

and which said wagon was then and there attached to a certain horse. And this plaintiff avers that by use of proper care and caution by said defendant the said street car could have been stopped then and there by said defendant, so that the said Karl Maika could have driven the said wagon to the side of the said Elston avenue then and there, and thereby avoided collision between said street car and said wagon. And this plaintiff alleges that the said defendant did not stop the said street car then and there, and therein made default, but instead of using proper care and caution in this behalf the said defendant, by and through its said servants, did then and there negligently drive the said street car at a high and dangerous rate of speed, then and there, while said Karl Maika, with all due care and caution, was then and there rightfully driving said wagon northward over and along said Elston avenue, then and there as aforesaid; thereby the said street car violently struck against said wagon," whereby said Karl Maika was injured and killed, etc.

We think that this count, after verdict, must be held to allege that the defendant negligently ran and operated its said car, and that as a result of such negligence, plaintiff's intestate, while in the exercise of due care, etc., was struck by said car and so injured that death ensued, and to state a cause of action.

The plea of not guilty did not put in issue the ownership of the street car line or the cars operated thereon. *C. U. T. Co. v. Jerka*, 227 Ill. 95; *C. U. T. Co. v. Wirkus*, 131 Ill. App. 485. The defendant will therefore, in the further consideration of the case, be regarded as in possession and control of the line of railroad in question and of the cars operated thereon.

In Elston avenue, a north and south street, defendant operated a double track electric street railway; the north-bound cars ran in the east track and the south-bound in the west. Fox place runs west from but does not cross Elston avenue. Elston avenue is forty feet wide from curb to curb, and the distance on

Brunhild v. Chicago Union Traction Co., 144 App. 198.

each side from the curb to the nearest rail is about twelve feet. It was quite dark when the accident occurred, but there was an electric street light at the northwest corner of Elston avenue and Fox place. Maika was driving a one horse wagon north in the north-bound track in Elston avenue. As he approached Fox place a north-bound car came up behind him and the bell on the car was rung violently as a signal to him to turn out of the track, and continued to ring until he turned out. At that time there was a wagon standing on the east side of Elston avenue, between the east rail and the curb, south of the south line of Fox place. Maika turned out to the west, the north-bound car passed by and he began to turn back to the east. Before his wagon had cleared the south-bound track a south-bound car on that track struck his wagon and he was thrown out and so injured that he died.

From the evidence the jury might, we think, properly find that when Maika began to turn out of the track, the south-bound car was about 200 feet away, with two streets, Blanche street and Fox place, between him and the car, and that, because of said wagon, he could not turn to the east and clear the north-bound track. There is no evidence tending to show that he did not promptly turn back to the east and endeavor to clear the south-bound track, so soon as the north-bound car had passed. We think that on the evidence in this record the question whether Maika exercised reasonable care for his own safety was a question for the jury on which their verdict must be held conclusive.

Rosengreen, the motorman in charge of the car which struck the wagon, testified that when he first saw the wagon it was forty or fifty feet away from his car; that from the time he saw the wagon he used all the means in his power to stop the car; that the car had nearly stopped when it struck the wagon. Albrecht, a witness called by plaintiff, testified that he was on the front platform of the south-bound car; that he saw

the wagon when it turned out of the north-bound track; that it was then 200 feet away from the car. Thrum, a witness for the plaintiff, testified that he was on the south-bound car, and in effect testified that he saw the wagon when it was more than a hundred feet away from the car. Rosengreen, on his cross-examination, said that at the coroner's inquest he might have stated that when he first saw the wagon it was a hundred feet away. Brunhild, a witness for the plaintiff, testified that Rosengreen did make such statement at the inquest.

The collision occurred near the south line of Fox place, a few feet north of that line according to the testimony of plaintiff's witnesses, a few feet south of it according to the testimony of defendant's witnesses. There was an electric street light at the northwest corner of Fox place and Elston avenue. The north-bound car was lighted and the wagon as it passed from the east track to the west passed between the south-bound and the north-bound car.

We think that on the evidence the question whether the motorman in charge of the south-bound car exercised reasonable care in the management and operation thereof, or was guilty of negligence in such management and operation, was also a question for the jury on which their verdict must also be held conclusive.

The judgment of the Circuit Court will be affirmed.

Affirmed.

Mr. Justice CHYTRAUS took no part in the decision of this case.

CASES
DETERMINED IN THE
SECOND DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS
DURING THE YEAR 1908.

**W. H. Payson, Jr., Appellant, v. Village of Milan,
Appellee.**

Gen. No. 4,907.

1. EVIDENCE—*effect to be given to view of premises in action for injury to real property.* Where the court in the exercise of its discretion, or by consent, has permitted a view of the premises in question, it is error to instruct the jury that the verdict may be predicated upon such view in disregard of what the evidence might otherwise have established. *Culbertson & Blair Provision Co. v. Chicago*, 111 Ill. 651, and *People v. General Electric Co.*, 172 Ill. 129, distinguished.

2. EVIDENCE—*what competent to show authorization of improvement.* In an action for injury to real property, in order to show the authorization of the improvement and as a declaration against interest, it is competent to receive in evidence a resolution of the village defendant authorizing the improvement alleged to have caused the damage; also the specifications for the work.

3. EVIDENCE—*what error to exclude.* It is error to exclude evidence which goes to the direct denial of testimony introduced by the other party.

Trespass on the case. Appeal from the Circuit Court of Rock Island county; the Hon. EMERY C. GRAVES, Judge, presiding. Heard in this court at the October term, 1907. Reversed and remanded. Opinion filed April 14, 1908. Rehearing denied October 28, 1908, and additional opinion filed.

J. T. & S. R. KENWORTHY and THOMAS J. WELCH,
for appellant.

SEARLE & MARSHALL, for appellee.

MR. PRESIDING JUSTICE WILLIS delivered the opinion of the court.

W. H. Payson, Jr., instituted this suit in the Circuit Court of Rock Island county against the Village of Milan to recover damages alleged to have resulted from the construction of a levee and ditch upon and along Water street in said village in front of land owned by him.

The declaration averred appellant's ownership and possession of lot 1, block 1, Dickson's Addition to the Village of Milan, situated immediately north of Water street in said village with a natural water-course on the east side thereof known as Mill creek which flowed from the south and east past said lot and thence north into Rock river, and that said Water street was about level with said lot, affording access and egress from any part of said street to said lot, and that in October, 1904, appellee unlawfully caused an embankment to be constructed and a ditch dug on said street, which caused the waters of said Mill creek to overflow his land and crops, by which he lost the use of said lands and his right of access and egress to and from said land was impaired. There was a plea of not guilty interposed, a trial resulting in a verdict of not guilty, a motion for a new trial was overruled, judgment was entered against the plaintiff and he prosecutes this appeal.

The evidence shows that Rock river forms the northern boundary of the Village of Milan and Mill creek its eastern boundary. Water street runs east and west in the village and intersects Mill creek, leaving a triangular strip of land between it and Rock river varying in width from two to three rods on the west to about forty rods on the east at its intersection with Mill creek. Appellant is the owner of about twelve or thirteen acres lying between this street and Rock river, its eastern boundary being near Mill creek.

This creek drains a large area of country south of the village, and prior to 1893, emptied into Rock river. The village is low and has been subjected at times to flood during high water. In 1893, the U. S. Government constructed the Hennepin canal, which, beginning at the confluence of the Rock and Mississippi rivers, extends easterly for a distance of twelve or fifteen miles in the bed of Rock river. Opposite the Village of Milan, there are islands which divide Rock river into what is known as the north and south branches. The canal as constructed cut the south branch next the village off entirely from the main stream so that the waters of Mill creek were confined to the south branch. The result was that the south branch, being no longer cleaned by the ordinary flow of water, began to fill up with sediment deposited by Mill creek, and the waters of that stream which were theretofore discharged into Rock river were obstructed and thrown back by the south wall of the canal and their flow westerly obstructed. With the consent of appellee, the U. S. Government in 1904 erected a levee along Water street a distance of about 3,000 feet entirely along appellant's land. This levee was raised to a height of four to six feet, and along the north side was dug a ditch which extended the length of the land in question, and on the east to the bank of Mill creek. The west bank of Mill creek was low, not more than a foot above its bed, and about the center of appellant's land was a low place or pond, connected with which was a natural swale or draw clear across his land.

Appellant claimed that the levee and ditch cut off all access to and all egress from his lands except at the southeast corner, where a fill or driveway was constructed leading from the street across the ditch, and that the land was greatly damaged by the building of the levee and ditch, thereby confining the flood waters on the land and subjecting it to the burden of carrying them off, injuring the land for building purposes; and that the ditch conducted the waters from

Mill creek in flood times west to the pond on his land, thereby washing it away and opening a ditch through the swale or draw.

There was the usual variance between the estimates of the witnesses as to the damages. The jury viewed the premises, to which no objection is made, but it is urged that they were erroneously instructed as to the extent they might use their view in considering their verdict.

The eighteenth instruction given for appellee was in the following words:

“The court instructs the jury that if they believe from the whole evidence that they have from personal examination of the premises arrived at a more accurate judgment as to whether the plaintiff’s lands have been damaged or not damaged by the construction of the embankment and ditch in question, than is shown by the evidence in open court, then in that case the jury may, upon the evidence, determine this question by their judgment so derived from a personal examination of the premises as a jury, even though it may differ from the weight of testimony given by witnesses in open court.”

In *Rich v. City of Chicago*, 187 Ill. 396, a special assessment proceeding wherein an instruction was given reading as follows, “The jury are instructed that their view of the premises assessed in this case, and the facts that they may have acquired from such view, so far as they pertain to special benefits that said premises may or may not derive from the proposed improvement, is evidence for them to make up their verdict,” the court said: “It was within the power of the court to permit the jury to view the premises, as in cases at common law, if the court in the exercise of a sound discretion considered such view necessary or proper to enable the jury to understand and apply the evidence. But such view, or the facts ascertained by the jury upon such view, could not, of itself or themselves, be considered as evidence in arriving at the verdict;” and cited *Vane v. City of Evanston*, 150 Ill.

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616; Osgood v. City of Chicago, 154 Ill. 194; and added: "The rule is not the same in cases of this character as in condemnation cases, where the statute provides for such view." In the Vane case the court said, that, "The only purpose of permitting the jury to inspect and view the *locus in quo* is to better enable them to understand the matter of controversy between the parties, and to clear up any obscurity that may exist in the application of the evidence introduced in the case. * * * They were not authorized to consider any fact bearing upon the merits of the controversy derived from such view." It is very clear that appellee's 18th instruction is in direct conflict with what was said in Rich v. City of Chicago and Vane v. City of Evanston and to allow such a practice, as said in the Vane case, "would introduce a great uncertainty in the trial of all common law cases where a personal view was permitted." In the case at bar instead of limiting the effect of the view as evidence in the case by proper instruction, the court instructed the jury that if they believed from all the evidence that they had arrived at a more accurate judgment as to whether the lands were damaged or not from their view of the same, than was shown by the evidence in open court, then they might disregard the weight of such evidence and render a verdict based upon their view. This was error. This instruction violated the rule of law long established. Appellee's counsel cite Kiernan v. Chicago, Santa Fe & California Railway Company, 123 Ill. 195, as a case sustaining such instruction, but we do not so regard it. The instruction in that case was given in a proceeding under the eminent domain act. Atchison, Topeka & Santa Fe Railroad Company v. Schneider, 127 Ill. 144; Peoria Gas Light Company v. Peoria Terminal Railway Company, 146 Ill. 372; Chicago & State Line Railway Company v. Mines, 221 Ill. 448.

Appellant offered in evidence the resolution of the Village of Milan authorizing the improvement and also

specifications for the work, which were excluded on objection of appellee. The resolution and specifications were competent for the purpose of showing that the improvement was made with the permission of appellee, and as a declaration against interest.

Appellee introduced testimony tending to show that appellant's access and egress to and from the land were not interfered with by the levee and ditch, claiming that he never had more than one entrance or egress before, and that the levee and ditch enhanced the value of the land. In rebuttal, appellant offered to show that he had a number of ways in and out, and that the land was not benefited as claimed by appellee. To these offers the court sustained an objection. The evidence so excluded was competent, and its exclusion error.

For the errors indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

OPINION PER CURIAM. Upon a petition for a rehearing appellee contends that the view by the jury in this case was practically by consent, and that we have failed to give due consideration to Culbertson & Blair Provision Co. v. City of Chicago, 111 Ill. 651, where in a suit for damages to real estate an instruction was approved which told the jury that as the parties had by mutual consent allowed the jury to view the premises, they had the right in finding their verdict to take into account such facts as they learned by viewing the property. Four Illinois cases were there cited as supporting said instruction. Each of these was a condemnation case. In three of them the subject of a view by mutual consent was not mentioned or involved. In one of them the view was at the request of both parties, but the fact that both parties requested the view was not made the basis of the decision nor the subject of comment. The decision in Culbertson & Blair Provision Co. v. City of Chicago, *supra*, was referred to

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with approval in *People v. General Electric Co.*, 172 Ill. 129, 145, but that was not a jury trial but an information in equity to enjoin a railway company from doing certain things, and the parties agreed that the trial judge might inspect the premises involved, and he did so. Appellee also cites *City of Chicago v. Spoor*, 190 Ill. 340, 366, as supporting and approving the case of *Culbertson & Blair Provision Co. v. City of Chicago*, *supra*, but that language was used in a dissenting opinion and is therefore not authority. The holding in *Culbertson & Blair Provision Co. v. City of Chicago*, *supra*, that a view by a jury in a common law action by consent of parties is evidence, has not been approved in a jury case, except by what was said in *Springer v. City of Chicago*, 135 Ill. 552, an action for damages to real estate, where such view by the jury was held to be "real evidence." This, however, was afterwards departed from. In *Vane v. City of Evanston*, 150 Ill. 616, a special assessment case, it was held that the object of a view at common law is to enable the jury to understand and apply the evidence. The court there stated that under the statute in condemnation cases, the information received by the jury by their personal view is to be considered as evidence, and then said: "Such was not the rule at common law, the purpose of the view being, as stated, simply to enable the jury to understand the issue, and apply the evidence. They were not authorized to consider any fact bearing upon the merits of the controversy derived from such view. To allow that to be done would be wholly inconsistent with the principles controlling in common law trials, and introduce great uncertainty in the trial of all common law causes where a personal view was permitted. Parties never would know upon what the jury based their finding, and the court would be in no position to control the evidence upon which it is predicated, or determine whether the verdict was based upon competent or upon the consideration of incompetent and illegal matters not admissible under the

issues.” In *Osgood v. City of Chicago*, 154 Ill. 194, a suit for damages to real estate, it was held that the *Vane* case modified the *Springer* case as to the effect to be given by the jury to their view of the premises. In *Rich v. City of Chicago*, 187 Ill. 396, a special assessment proceeding, the jury were instructed that their view of the premises was evidence for them in making up their verdict. It was held that this instruction violated the rule of evidence long established and that it was error to give it. In *Metropolitan West Side E. R. R. Co. v. Goll*, 100 Ill. App. 323, *City of Chicago v. McShane*, 102 Ill. App. 239, and by this court in *Petzel v. C. & N. W. Ry. Co.*, 103 Ill. App. 210, each of these being a suit for damages to real estate, it was held that the view by the jury was not to be treated as evidence upon which to base a verdict, but that its only purpose was to enable the jury to better understand and apply the evidence. We are therefore of opinion that the holding in *Culbertson & Blair Provision Co. v. City of Chicago*, *supra*, that a view by mutual consent in a common law case becomes evidence, must be regarded as abandoned.

Much inconvenience would result from applying the proposed rule to an ordinary action at law. where one party in the presence of the jury, asks that they be permitted to view the premises or the thing about which the parties are litigating. It is obvious that, if the opposite party should object, he would subject himself to the inference in the minds of the jury that a view would result unfavorably to his cause, and that he was seeking to prevent the jury from ascertaining the truth. In many cases he would be practically forced to consent to a view. The result would be that in practically every common law case where there is a *corpus* to be viewed, the view would be by consent and would become evidence, and under the 18th instruction given for appellee in the case now before us, the jury would have a right to base a verdict upon their own view differing from the weight of the testimony given in

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open court, and the courts of appeal would thereby be deprived of the power to review the evidence and to determine whether the verdict ought to stand upon the facts. No such result was intended to follow a common law view.

If, however, the rule announced in Culbertson & Blair Provision Co. v. City of Chicago, *supra*, that a view by consent in a common law case is evidence, be considered as still adhered to, it certainly cannot be claimed that it is evidence in any stronger sense than such a view would be under the Eminent Domain Act. Upon that question there has been a conflict of authority. Such an instruction in a condemnation case is practically approved in C. & I. R. R. Co. v. Hopkins, 90 Ill. 316, McReynolds v. B. & O. R. R. Co., 106 Ill. 152, and to some extent in Chicago General Ry. Co. v. Murray, 174 Ill. 259, and support for the instruction is found in Kiernan v. C. S. F. & C. Ry. Co., 123 Ill. 188, and Guyer v. D. R. I. & N. W. Ry. Co., 196 Ill. 370, condemnation cases. On the other hand in A. T. & S. F. R. R. Co. v. Schneider, 127 Ill. 144, a condemnation case, the court reviews the cases up to that time and says that while the view is in the nature of evidence and to be considered by the jury in connection with all the other evidence, and that an assessment will not be set aside merely because it may differ in amount from the preponderance of the evidence appearing in the record, yet it has never been held that all the evidence may be ignored and the amount fixed directly contrary thereto. The language of the court in the Kiernan case was qualified. It was there held that the verdict was contrary to the proofs and that a new trial should have been awarded. In Peoria Gas Light Co. v. Peoria Terminal Ry. Co., 146 Ill. 372, a condemnation case, the court instructed the jury that "if, after full consideration of all the testimony in the case in connection with your own inspection of the premises, you conclude that your own inspection of the premises is a more reliable basis for the estimate

and assessment of compensation and damages, then you have a right under the law, so to do, but you should not arbitrarily and without reason reject any of the testimony." It was held that this instruction clearly authorized the jury to base their verdict solely on their own inspection of the premises, if they were of the opinion that such inspection furnished a more reliable basis for an assessment than did the evidence of the witnesses, and gave the jury a clear intimation that if it was their opinion that their inspection of the premises furnished a more reliable basis for a verdict, that conclusion supplied a sufficient reason for wholly disregarding the testimony of the witnesses. It was held that this was not the law, and that the giving of this instruction was erroneous, and that the verdict must be supported by the evidence and can in no case rest solely upon the personal examination of the premises by the jury, however well convinced they may be that the examination furnishes a more reliable basis than the testimony of the witnesses for an assessment of the damages. The Schneider case was there treated as qualifying the Kiernan case. In this seeming conflict of authority we regard the later decision in Chicago & State Line Ry. Co. v. Mines, 221 Ill. 448, as controlling. The court there said "Appellees' first instruction was misleading, in that it was apt to cause the jury to conclude that they might disregard entirely the evidence heard in open court and fix the damages upon their view of the premises alone. Such is not the law. The evidence heard in open court must be considered by the jury. (Atchison, Topeka & Santa Fe Railroad Co. v. Schneider, 127 Ill. 144; Peoria Gas Light Co. v. Peoria Terminal Railway Co., 146 *id.* 372). The case of Guyer v. Davenport, Rock Island and Northwestern Railway Co., 196 Ill. 370, relied upon by appellee, does not go far enough in this regard to sustain their position." The abstract filed in the Mines case shows that the instruction there discussed read as follows: "The court instructs you

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gentlemen of the jury, as a matter of law, that your personal view of the premises is evidence, properly to be taken into consideration in making up your verdict, but unless you believe from the whole evidence in the case that you have from such personal examination of the premises arrived at a more accurate judgment and determination as to the value of the premises sought to be taken and of the amount of damages to property not taken, than is shown by the evidence in open court you should not attempt to fix such value and damages from your view of the premises alone without regard to the evidence produced in open court, but you should duly consider such evidence and weight of the testimony of the witnesses as and in the manner set forth in other instructions." The case was reversed for error in giving that and one other instruction. Under this authority it seems to us plain that it was error to give the 18th instruction requested by appellee, even if this case were to be governed by the rule in condemnation cases. The petition for a rehearing is therefore denied.

Al. F. Schoch, Trustee, Appellee, v. Peter Egan, Appellant.

Gen. No. 4,979.

1. **VERDICT**—*when not disturbed as against the evidence.* A verdict not manifestly against the weight of the evidence and which does not appear to have been the result of passion, prejudice or other undue influence, will not be set aside on review as against the weight of the evidence.

2. **INSTRUCTIONS**—*when as to proof of agency improper.* An instruction is properly refused which singles out but one fact in a chain of facts and tells the jury that it alone does not prove agency.

Action commenced before justice of the peace. Appeal from the Circuit Court of LaSalle county; the Hon. SAMUEL C. STOUGH, Judge, presiding. Heard in this court at the April term, 1908.

Affirmed. Opinion filed August 10, 1908. Rehearing denied October 9, 1908.

JAMES J. CONWAY and BUTTERS, ARMSTRONG & FERGUSON, for appellant.

H. M. KELLY, for appellee.

MR. JUSTICE WILLIS delivered the opinion of the court.

In 1902, Frank and William Sanders owned a lot in the city of Ottawa, Ill., and procured an option on a part of a lot adjacent to it for the purpose of selling the whole to the United States for a postoffice site. They sought to obtain therefor \$12,000. A subscription paper was circulated for the purpose of raising a fund to enable them to reduce the price the government would be required to pay to \$10,000. A prior subscription paper had been circulated to raise \$3,000 but a sufficient amount had not been subscribed, so a new plan was adopted whereby the subscription became binding when the sum of \$2,000 had been subscribed. Al. F. Schoch, appellee, was named in the subscription paper as trustee and payee. Twenty-two hundred dollars was subscribed, the sale was made to the government, the postoffice was built and all the subscriptions paid except Peter Egan's. The first subscription paper was circulated by Elmer Gladfelter and John Hiliard. Appellant was solicited by them and refused to sign. Peter Egan's name was signed to the second subscription for \$100. Schoch brought this suit before a justice of the peace of La Salle county against Peter Egan to recover the amount of the subscription, and had judgment. Egan appealed to the Circuit Court of said county where, just before the trial, he filed an affidavit denying the execution of the instrument sued on. There was a trial and a verdict for appellee for \$100. A motion for a new trial was denied, judgment was entered on the verdict, and this appeal

was taken by Egan. Appellee was absent from town at the time of the trial and was not a witness.

It is admitted that appellant never signed either subscription paper, although his name appears on both. It is contended by appellee that his son, Frank Egan, signed appellant's name to both subscriptions, and that he had authority to do so, or if he had not, that appellant ratified his act and became liable therefor. It is not denied by appellant that Frank Egan signed appellant's name to the first subscription, but it is denied that he signed the second. Appellant insists that the proof shows that the paper upon which the names of the subscribers were written, and upon which this suit is based, was originally attached to the first subscription paper, and afterwards detached therefrom and attached to the second subscription paper. There is some testimony tending to show that a part of the original subscription paper had been detached from it and attached to the new or second paper. John Hilliard, who with Elmer Gladfelter circulated the first subscription paper, but not the second, at first testified it might be that the same signatures were detached from the first subscription paper and attached to the second, but he seems to have afterwards receded from that position. At any rate, the proof clearly shows that he subscribed \$500 lower down than Peter Egan on the first paper and only \$400 on the second paper, which apparently demonstrates that what is termed the second subscription paper was an entirely new paper. Appellant denies that he authorized his son to sign his name, and there is testimony to the effect that he refused to sign the first paper. Frank Egan testified that he had no express authority from his father to make the signature. He did testify, however, that he was agent to conduct some portion of his father's livery business, but that there was nothing in that that authorized him to sign his father's name to the subscription paper. Frank Sanders testified that after the property had been sold to the govern-

ment, and after the other signers had paid, he asked appellant if it was not about time for him to pay the subscription and that appellant did not deny that the subscription was binding upon him, but stated that he did not know that the government would ever build a post-office on that site and inquired how he could know. Gladfelter testified that he met appellant on the street and appellant said he wondered if there was going to be any building there and that he guessed that he would have to withdraw his name if they did not get to work pretty soon, or words of like purport. If the testimony of Sanders and Gladfelter is true, which was for the jury to say, the conclusion is authorized that appellant ratified the act of his son in signing his name to the paper, and some force is added to their testimony by the fact that Egan owned property thereabouts which would be enhanced in value by the building to be constructed by the government. Appellant denied the interview with Sanders, which Sanders said was held in appellant's office, but agreed with him as to a later interview upon the street, in which he refused to pay. He denied having made the statement testified to by Gladfelter. Frank Egan testified that he told his father that he had signed his name to the subscription paper the day he did it and that his father said that he ought not to have done it. Appellant testified that shortly after Frank told him he went to Gladfelter and told him he had come to take his name off the paper, and that Gladfelter told him Schoch had it; that within less than five or six days he told appellee to take his name off the paper.

The evidence as to whether or not appellant ratified his signature to the subscription paper was conflicting, and the conflict was for the jury to decide, which they did in favor of appellee. Their verdict being sanctioned by the trial court, who had opportunity to see and hear the witnesses while testifying, and who could better determine their credibility and the weight to be accorded their testimony than a re-

viewing court, that verdict should not be disturbed on the facts.

We have considered with care the action of the trial court in the admission and exclusion of evidence complained of by appellant and find no reversible error therein.

The court gave on behalf of the appellee but one instruction, to which appellant urges in argument a number of objections; that there was no evidence upon which to base a greater part of the instruction, and in particular, that there was no evidence of any authority or agency given Frank Egan that would bind appellant; that there was no evidence that appellant ever learned of the signing by Frank Egan of the second subscription paper; that there was no evidence of any ratification whatever on the part of appellant of the signing of said second subscription paper; that there was no evidence that F. and W. Sanders acted on said subscription paper in submitting proposition of sale; and further, in the absence of such facts from the record, the instruction assumed the existence of such facts.

Without extending this opinion by quoting the instruction, we deem it sufficient to say that the record does disclose some evidence bearing upon all the appellant's objections to the instruction, sufficient at any rate, as we have already held, to warrant the jury in finding the existence of such facts in favor of the appellee.

Complaint is also made of the refusal of appellant's instructions 4, 5, 6 and 7. Instructions 4 and 5 each stated but one fact in the chain of circumstances developed by the evidence, and told the jury that that fact did not prove agency. Each of the facts so designated standing alone might not prove agency, and yet when combined with other facts in evidence, might prove it. Therefore there was no error in their refusal, neither has appellant just cause of complaint of the refusal of instructions 6 and 7, for the reason that

instruction 3 given for appellant embodies the same principle of law defined in 6 and 7 refused. The failure to repeat a principle of law already given to the jury is not error.

Finding no substantial error of law in this record, the judgment of the Circuit Court is affirmed.

Affirmed.

**Dominick Balsewicz, Sr., Administrator, Appellee, v.
Chicago, Burlington & Quincy Railway Company,
Appellant.**

Gen. No. 4,917.

1. **TRESPASSER**—*when person crossing upon right of way not.* A person who leaves a street crossing and passes around upon the right of way because of cars blocking the street passage, does not become a trespasser as a matter of law.

2. **RELEASE**—*when by administrator void.* A release of liability for negligently causing death made by an administrator who obtained letters without authority is void.

3. **PLEADING**—*what essential to question authority of administrator.* The representative capacity of an administrator suing for negligently causing the death of his intestate can only be questioned by special plea.

4. **EVIDENCE**—*what may establish wilfulness.* Failure to observe a speed ordinance may establish wilfulness; and an instruction in the negative of this proposition, disapproved.

5. **ASSIGNMENTS OF ERROR**—*when deemed waived.* Assignments of error not argued are deemed waived.

Action in case for death caused by alleged wrongful act. Appeal from the Circuit Court of Bureau county; the Hon. SAMUEL C. STOUGH, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed August 10, 1908. Rehearing denied October 13, 1908, and opinion modified.

CAIRO A. TRIMBLE, for appellant; CHESTER M. DAWES and J. A. CONNELL, of counsel.

POMEROY & DEMERATH and JOHN L. MURPHY, for appellee.

MR. JUSTICE WILLIS delivered the opinion of the court.

Main street in Kewanee runs north and south and is crossed nearly at right angles by the tracks of appellant, the Chicago, Burlington and Quincy Railway Company. South of the railroad, and east of Main street, are the works of the Western Tube Company. On April 29, 1905, there were about 420 people employed at the Tube Works who were let out at ten minutes to twelve, and at twelve m., many going north across these tracks to their dinner. South of the main tracks were two passing tracks and next to the Tube Company buildings, a switch track, all parallel with the main tracks. Some little distance farther south were two tracks running diagonally from the railway into the Tube Company plant. North of all these tracks and south of the last of these diagonal tracks were gates across Main street. There was a twenty foot space in which there was a sidewalk north and south on each side of Main street. There was an arm of the gate closing the west sidewalk of Main street when the gates were down on the south side of the tracks, but the corresponding arm on the east side of the street, south of the railroad tracks, was gone, and there was no gate protection for the east twenty feet of the street south of the tracks, including the sidewalk. These gates were operated from a tower situated sixteen feet west of the west line of the street. Just before 12 o'clock on April 29, 1905, a switch engine with several cars attached was across Main street on the south one of the tracks that are parallel. There was proof that said engine and cars were standing still upon and over the crossing, and other proof that they were moving slowly. If the jury found that they were standing still upon the street crossing, this court would not be justified in disturbing that conclusion after it has been approved by the trial judge who also saw the witnesses. At about noon a west-bound passenger train came in on the north main track and

stopped at the depot two blocks west of Main street. About this time, Dominick Balsewicz, the deceased, came out of the Tube Works where he was employed, went north on the east sidewalk of Main street, and passed the place where the south gates were. At that time the gates were not down, but were lowered before a man behind him reached them. When deceased reached the switch train, he turned west, ran around the west end of the switch engine, and then northeasterly towards the street on the opposite side. The tower man called to him to stop, and another railroad man caught hold of him and tried to stop him. Deceased did not understand English, and appears to have been frightened. He ran in front of the approaching passenger train and was struck by the pilot or pilot beam, and thrown to a point sixty feet west of the street, dying almost instantly. July 27, 1905, letters of administration on the estate of the deceased were issued by the County Court of Bureau county to Dominick Balsewicz, appellee, who instituted this suit against appellant, the Chicago, Burlington and Quincy Railway Company, in the Circuit Court of said county to recover for the loss to the next of kin of the deceased, who were appellee, the father, and the mother, with numerous brothers and sisters. The declaration contained eight counts, and alleged illegal blocking of the crossing by a switch train; violation of an ordinance of the city of Kewanee prohibiting railroad companies from blocking crossings by stopping engines or cars thereon longer than five minutes unless absolutely necessary, and in no case longer than ten minutes; wantonness in running at a high rate of speed, to wit: forty miles per hour; violation of an ordinance of the city of Kewanee prohibiting the speed of freight trains at more than six miles, and passenger trains at more than ten miles per hour; failure of defendant to warn persons using crossing of the approach of trains, and failure to maintain gates or effective system of signals of danger at crossings. Each count averred that de-

ceased was in the exercise of due care for his own safety. The allegation in regard to blocking a crossing for more than ten minutes was dismissed. Appellant filed a plea of not guilty. A trial was had resulting in a verdict for \$1,500 for appellee. A motion for a new trial was denied, judgment was entered on the verdict for \$1,500 and \$33.55 interest which accrued because of the delay in hearing the motion for a new trial. The company prosecuted this appeal.

Appellant's proof is, that the switch train was moving west and continued to move west after the accident. Appellee's testimony is that it went back east after the accident and cleared the street. There was as much evidence tending to show that it went east as that it went west. Deceased was a boy of but eighteen years and had been in this country but one year, and did not speak or understand English, and may not have understood the well-meaning efforts of the railway men to warn him and may have been confused and frightened by them. The evidence is conflicting as to whether he ran east or west of the tower. If he ran east, he did not go far beyond the street line. This was a public street crossing, the only crossing for two blocks, and was used by many people at this time of day. Appellee's proof shows that the train was running at the rate of twenty-five to forty miles per hour as it crossed Main street, and appellant's proof shows that it was running from fifteen to twenty miles per hour. The fact as shown by the evidence, that deceased was thrown a distance of sixty feet indicates that the speed was great. It was running in violation of the ordinance declared on and the gates afforded him no warning.

Whether the crossing was obstructed in violation of the ordinance or not, and whether the train was being driven by appellant's servants at a reckless and wanton rate of speed, as charged in the declaration, and whether deceased was in the exercise of ordinary care for his own safety, were contested questions of fact

for the determination of the jury. These, they found in favor of appellee and their finding, which in our opinion is supported by a preponderance of the evidence, should not be disturbed except for some material error of law by which they may have been misled.

It is contended that deceased became a trespasser when he left the street, and having been struck west on the right of way, no recovery can be had unless appellant was guilty of wanton conduct, and that there is no ground for that holding. In *Chicago Junction Co. v. McGrath*, 107 Ill. App. 100, a case in which the deceased stepped off a street crossing upon the right of way of the railway company to go around cars standing upon the crossing, and was struck by cars suddenly kicked back, receiving injuries from which he died, the court held that a private individual is not by law compelled to stop and wait at a railroad crossing until the railroad company has removed cars which partly blockade it and that he has the right to pass around the end of the cars, and in so doing does not become a trespasser, nor put himself outside the protection of the law if he steps over the line of the street onto the railroad yards. This case was appealed to the Supreme Court where it was held that the question whether deceased was guilty of negligence was properly submitted to the jury. 203 Ill. 511.

Appellant introduced in evidence over appellee's objection, letters of administration dated June 5, 1905, issued by the Probate Court of Cook county on the estate of deceased to one Joseph T. Wachowski, and a receipt for \$100 received from appellant signed by said Wachowski as administrator of the estate of deceased in consideration of which he released all his claim as administrator, and that of next of kin of deceased, growing out of the death of said deceased on account of said accident. Appellant asked the court to give an instruction to the effect that such release barred a recovery, which the court refused to do, which

Balsewicz v. C., B. & Q. Ry. Co., 144 App. 219.

ruling appellant contends was error. The proof is undisputed that the father, mother, brothers, and sisters of deceased lived in Bureau county at the time that letters were issued by the Probate Court of Cook county, and that deceased was a minor and had lived with his parents until about three weeks before the accident, when he went to Kewanee to secure work. Deceased had never lived in Cook county, had no property in that county, none of his next of kin lived in that county, and none had consented that letters of administration should be granted to Wachowski, and just how he broke into the administration is not apparent, and his good faith may reasonably be questioned. The parents and next of kin of deceased were entitled by law to the exclusive privilege of taking out letters of administration during the first sixty days after the death of deceased, and the Cook county letters issued within that time usurped the rights of next of kin of deceased and were void. Moreover, appellee's representative capacity could only be attacked by special plea. *Union Railway & Transit Co. v. Shacklet*, 119 Ill. 232; *C. & A. R. R. Co. v. Smith*, 180 Ill. 453. Hence there was no error in the refusal of the instructions that the release barred a recovery.

Complaint is made of appellee's third instruction which reads as follows:

"If you believe from the evidence that at the time and place in question Dominick Balsewicz, Jr., while walking northward on the street in question, arrived at the crossing in question and found it blocked by a locomotive engine attached to some cars of defendant, standing across the street there, and that thereupon he went a short distance across the west line of said street onto the private lands of said defendant and proceeded around the west end of said train of cars and engine, with a view to resume his journey along said street after passing said train so standing there, and that while so doing, he was exercising ordinary care for his safety, under all circumstances, then you are instructed that in so going around the end of said train

he did not put himself outside of the protection of the law nor become a trespasser."

In view of what we have already suggested, and the holding in *Chicago Junction Ry. v. McGrath*, *supra*, we are of the opinion that there was no error in this instruction.

Complaint is made of the refusal of an instruction which read as follows:

"You are further instructed, that wilfulness or wantonness, in the infliction of an injury, is not chargeable against a Railroad Company merely by reason of the failure of a Railroad Company to comply with the ordinance of the City, as to the limit of speed of its trains, within the corporate limits where such injury may occur."

It is not true that a failure to comply with an ordinance cannot establish wilfulness and wantonness against a railroad company. It may or may not prove wantonness, and wilfulness. For example, if it had appeared from the evidence that the train that killed the deceased had run at a speed of sixty miles per hour over this crossing, it would have shown wilfulness and wantonness. There was no error in the refusal of this instruction.

Appellant complains of the refusal of other instructions, but these are the only ones argued, and the errors as to the others are therefore waived. We will add, however, that they are all addressed to the proposition that deceased necessarily became a trespasser when he went upon appellant's right of way in order to pass around the switch train, and this position is untenable, as we have already held.

Finding no reversible error in the record, the judgment of the trial court is affirmed.

Affirmed.

Malloy v. Kelly-Atkinson Construction Co., 144 App. 226.

Martin D. Malloy, Appellee, v. Kelly-Atkinson Construction Company, Appellant.

Gen. No. 4,993.

1. **MASTER AND SERVANT**—*how question of fellow-servants to be determined.* Where the evidence tends to show that an employe of the master is a vice-principal, the question is one to be determined by the jury; also, if such employe acted in a dual capacity, it is for the jury to say whether a particular act was that of a vice-principal or fellow-servant.

2. **MASTER AND SERVANT**—*what not assumed risk.* A servant does not assume a danger of which he has no knowledge or means of knowledge; risk of injury through the negligent order of a foreman is not assumed by the servant.

3. **MASTER AND SERVANT**—*how question of assumed risk determined.* Where the evidence is conflicting the question whether the risk is assumed is to be determined by the jury.

4. **VERDICT**—*when not excessive.* A verdict of \$3,000 rendered in an action for personal injuries is not excessive where it appears that the plaintiff's arm was broken and his wrist dislocated, that he suffered pain, incurred expense in being treated, lost two months' time and the use of three fingers of his right hand, it appearing that such plaintiff was a structural iron workman earning \$4.85 per day prior to the accident.

Action in case for personal injuries. Appeal from the Circuit Court of Will county; the Hon. ALBERT O. MARSHALL, Judge, presiding. Heard in this court at the April term, 1908. Affirmed. Opinion filed October 14, 1908.

KREMER & GREENFIELD, for appellant.

B. J. WELLMAN and E. J. CONLEY, for appellee.

MR. JUSTICE WILLIS delivered the opinion of the court.

In October, 1906, the Kelly-Atkinson Construction Company, appellant, was erecting a steel railroad bridge in the city of Chicago, near which were two railroad tracks running east and west, elevated from six to eight feet. The completion of the bridge necessitated the erection of a wooden tower, the timbers for

which were brought on cars and thrown off on the outside of the south track, and when needed were lifted by a line which ran through a pulley fixed to the tower of the bridge about 60 feet above the center of the south track. The line was fastened about the middle of the timber and operated by an engine called a "nigger head," which stood on a level with the railroad tracks. The timbers had to be moved from the ground to the tower without obstructing certain trains. On October 26, 1906, while appellee and three of appellant's other employes, including Brown the foreman, were removing a timber twelve by twelve and thirty feet long, from the ground to the tower, an approaching train necessitated their placing it between two tracks temporarily. The space between the tracks was seven or eight feet wide, in which was a depression of two or three feet, across which a timber three by ten, or four by eight, had been laid, the ends resting upon the earth at the edge of the tracks. In moving the timber over between the tracks it was raised two or three feet. Two men took hold of one end, swung it around between the tracks and rested their end on the deck of the bridge. Appellee took hold of the other end, swung it over between the tracks, by pushing against it with his hands and breast, when Brown, the foreman signalled "all off" to the man at the "nigger head," and the machinery was released, and the timber dropped on the cross piece, which broke, and appellee fell into the depression with the end he was breasting in such a way that the weight of his body caused a fracture of his left arm and the dislocation of his wrist.

On March 26, 1907, he brought this suit in the Circuit Court of Will county to recover damages for such injuries. The original declaration consisted of one count which averred that when appellee was injured he was engaged in moving a timber for appellant which had been raised by machinery under the direction of appellant's foreman and vice principal, and while he was pushing on the timber close to or over a

certain excavation the foreman negligently ordered the machinery to be instantly released without warning to appellee, thereby causing the timber to drop, and that by reason of such negligence appellee was injured. The declaration did not allege that the foreman was not a fellow-servant of appellee, and omitted all reference to the cross piece which broke and caused the timber to fall into the depression. There was a plea of not guilty, and a verdict for appellee for \$5000. A motion for a new trial was made. Thereafter, by leave of court, over appellant's objection, appellee filed an additional count which averred that the plank, three by ten, placed over the depression to hold the timbers was of insufficient strength to hold said timber, and that said foreman well knew or should have known it was dangerous and unsafe to drop said timber upon said plank in the position appellee was standing, and that the timber, together with appellee, fell into said excavation, breaking through said plank, and that because of said negligence in ordering said machinery released and said beam to be dropped, appellee was injured. On the argument of the motion for a new trial the court required appellee to remit \$2000 from the verdict, which was done. The motion for a new trial was denied, judgment was entered on the verdict for \$3000 and the company appealed.

It is urged that there can be no recovery because Brown, in giving the "all off" signal was not performing the act of a vice principal, but that of a fellow-servant. All the witnesses testified that he was appellee's foreman, and no objection was made to such testimony. The proof shows that he gave orders to appellee and to the man in charge of the "nigger head," relative to handling the timber, and also that he frequently worked with the men in handling the timbers. The question whether Brown at the time of the accident was a vice principal or a fellow-servant was one of fact for the jury. *Goldie v. Werner*, 151 Ill. 551; *C. & E. I. R. R. Co. v. Driscoll*, 176 Ill. 330. Although he

was acting in a dual character, the question whether the particular act of signalling the man in charge of the nigger head "all off" was the act of a fellow-servant of appellee, was also a question of fact for the jury. *Mobile & Ohio Co. v. Massey*, 152 Ill. 144, *C. & E. I. R. R. Co. v. Driscoll*, *supra*. If the timber was dropped by reason of the authority which Brown exercised as vice principal, the fact that he worked with appellee and the other men more or less did not exonerate the master from liability for the former's negligence in the exercise of his authority over the others. *Chicago & Alton R. R. Co. v. May*, 108 Ill. 288; *Pittsburg Bridge Co. v. Walker*, 170 Ill. 550; *Offutt v. World's Columbian Exposition*, 175 Ill. 472; *Metropolitan West Side Elevated Railroad Co. v. Skola*, 183 Ill. 454; *Norton v. Nadebok*, 190 Ill. 595; *Graver Tank Works v. O'Donnell*, 191 Ill. 236.

It is argued that appellee assumed the risk. The evidence shows that an "all off" order had never before been given at that place under such circumstances. One of the first principles of the assumption of risk is knowledge of the danger. Appellee could have no knowledge that he would be subjected to danger through a negligent order of the foreman. Whether he assumed the risk or not was also a question of fact for the jury.

The original count averred negligence in giving the order "all off" which meant to let the timber fall instantaneously. The additional count was based on the proposition that the plank across the depression was of insufficient strength if the timber dropped thereon suddenly, and for that reason it was negligence to cause the timber to be suddenly dropped. We are of the opinion that the judgment on the question of appellant's liability can be sustained under the original declaration. If the additional count was necessary to constitute a cause of action its averments were not at variance with the evidence introduced on the trial, and it was proper to permit it to be filed.

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It is argued that the damages are excessive even after the *remittitur* of \$2000 ordered by the trial court. The evidence is undisputed that appellee's arm was broken and wrist dislocated. He suffered pain and incurred some expense in being treated and lost two months time and had lost the use of three fingers of his right hand. He was a structural iron workman, earning \$4.85 per day, previous to the accident. His ability to do portions of his former work must necessarily be somewhat impaired. A doctor, after an examination of appellee at the time of the trial, testified that the condition of the hand might or might not be relieved by an operation, and that for any work requiring the skilful use of both hands, the injured hand was practically worthless. It is true that the evidence does show that appellee had, at times since the injury, earned nearly as much money as he did before, but it was not at his regular employment.

The judgment is affirmed.

Affirmed.

Nels Granquist, Appellee, v. Western Tube Company,
Appellant.

Gen. No. 4,997.

1. **MECHANIC'S LIENS**—*effect of claiming upon property not chargeable.* The right to a lien upon property chargeable will not be defeated because a claim for lien has been made against more land than is subject thereto if such claim has not been fraudulently interposed and has not misled or injured any one.

2. **MECHANIC'S LIENS**—*when payments to contractor not lawful.* As against a subcontractor, payments made to the contractor by the owner without having obtained the statutory statement, are unlawful and will not defeat the unpaid claim of a subcontractor.

3. **MECHANIC'S LIENS**—*award of solicitor's fees improper.* The statute which authorizes the allowance of solicitor's fees to a mechanic's lien claimant is unconstitutional. *Manowsky v. Stephan*, 233 Ill. 409, followed.

4. **MECHANIC'S LIENS**—*effect of failure to make parties.* The

failure of a lien claimant to join a necessary party will not defeat the lien claimant where the objection is not urged by the defendant in apt time.

5. *MECHANIC'S LIENS—when suit brought in apt time.* Held, that under the facts of this case the action to enforce the lien claim was brought in apt time.

6. *PARTIES—when objection of non-joinder comes too late.* An objection of the non-joinder of parties in interest comes too late when first raised on appeal.

7. *DECREE—to whom award of solicitor's fees should be made.* Where the statute provides that solicitor's fees may, in a particular instance, be awarded to a party, it is improper to make the award in favor of the solicitor of such party.

Mechanic's lien. Appeal from the Circuit Court of Henry county; the Hon. EMERY C. GRAVES, Judge, presiding. Heard in this court at the April term, 1908. Affirmed in part, reversed in part. Opinion filed October 14, 1908.

KNAPP, HAYNIE & CAMPBELL, CHARLES K. LADD and MARK BREEDEN, JR., for appellant.

CHARLES E. STURTZ and WM. C. EWAN, for appellee.

MR. JUSTICE WILLIS delivered the opinion of the court.

This is an appeal from the Circuit Court of Henry county to review a decree of that court allowing Nels Granquist, appellee, a subcontractor, a mechanic's lien on property owned by appellant, the Western Tube Company.

On July 17, 1906, Granquist filed a petition in said court against the Western Tube Company, and Frederick H. Mathews and Charles F. McMullen, co-partners doing business as the Mathews Construction Company, to establish and foreclose a subcontractor's mechanic's lien. The petition alleged that the Mathews Construction Company and the Western Tube Company entered into a written agreement on June 28, 1905, for the construction of an office building according to certain plans and specifications to be completed on or before

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December 1, 1905, for the sum of \$16,400 with a provision for \$5 liquidated damages for each day thereafter the work was not completed. The contract which was attached to the petition did not describe the premises where the building was to be located, but called it an office building or extension according to certain plans, specifications and drawings, and referred to a brick wall at the south of the old building. The petition further alleged that on June 29, 1905, the Mathews Construction Company entered into an agreement with appellee, by the terms of which appellee was to furnish the necessary material and labor for all the brick and mason work necessary for the construction of said office building for \$7750; and that in pursuance of said agreement said office building was built on lots 1 and 2 in block 13, of the original town, now city of Kewanee; and that the petitioner furnished the material and labor for all the brick and mason work required for the construction of said office building in accordance with the plans and specifications, and fully completed his work; and that the time for the completion of said building was by the consent of appellant and the Construction Company extended from December 1, 1905, to June 1, 1906, and that he completed his work on May 18, 1906, which was accepted by the Construction Company and appellant; that there was then due him for said work and material \$1194.74; and that on July 21, 1906, within sixty days after the completion of his work, he caused a written notice of his claim to be served upon appellant, and that \$166.11 of the amount so due was for extra work and materials furnished at the request of the Construction Company and appellant, and that there was due him at the time of filing this petition \$760.08. The petition stated that Porter and Trask claimed to have a lien on said premises, but that it was subject to the rights of appellee. Appellant answered the petition, and admitted that it had entered into a contract with the Mathews Construction Company, substantially as stated in the petition,

and that appellee entered into a contract with the Mathews Construction Company as stated in the petition but denied that said building was completed within the time specified in the contract, or completed at all, or accepted, or that appellee furnished extra materials for said building for which it was to pay any sum, and denied that any sum was due appellee on account of said contracts, or that appellee had a right to a claim or lien on said premises on account of said work. November 24, 1906, appellee filed a general replication to said answer. The petition was taken as confessed against Mathews and McMullen, and the cause was referred to the master to take the proofs and report the same into court with his conclusions. The master heard the proofs and reported that appellee was entitled to a lien on lots one and two. To the master's report, appellant filed a number of objections, one of which was that it appeared from the evidence that no part of the building was on lot one, but that it was on lots two and three. This objection was held to be good and the master amended his report and found that the lien should be allowed on lot two, and overruled appellant's other objections. There was a hearing before the court upon the objections to the master's report. The court approved the finding of the master and entered a decree granting appellee a lien for \$760.08 on lot two and \$76 to appellee's counsel as attorney's fees. From this decree the Western Tube Company appealed.

Appellant argues first, that the decree was erroneous because it found that a lien should be allowed on lot two, whereas the petition alleged that the building was erected on lots one and two, on the ground that appellee was bound by the allegation in the petition and that to entitle him to recover, he must prove the whole allegation; and that appellee failed in this because the evidence did not show that the building was erected on lots one and two, but did show that it was erected on part of lot two, on the alley between lots two and three, and on a part of lot three.

Counsel for appellant contends that a subcontractor can have a lien the same as the original contractor under section one of the Mechanic's Lien Act of 1903, which provides that a lien may be had upon the whole of such lot or tract of land and upon the adjoining or adjacent lots or tracts of land of such owner, constituting the same premises and occupied or used in connection with such lot or tract of land as a place of residence or business; and in case the contract relates to two or more buildings or two or more lots or tracts of land, upon all of such lots and tracts of land and improvements thereon for the amount due with the interest thereon, and that this means a lien must be taken upon all the premises occupied by the building or none.

We cannot agree with counsel on this proposition. In *Sorg v. Pfalzgraf*, 113 Ill. App. 569, a suit to enforce a mechanic's lien, the bill located the house on lots nine and ten. On the trial it developed that it stood on lots eight and nine, and not on lot ten. It was then too late to enforce a lien against lot 8. The court ordered a decree against lot 9 only. We there said, the owner cannot be permitted to defeat the lien upon his land which the law has given the builder, simply because the builder might have obtained a lien upon more of the owner's land. The fact that a lien is claimed on more land than is subject thereto does not defeat the lien, if it does not mislead or injure anyone, and if it is not done fraudulently. *White Lake Lumber Co. v. Russell*, 22 Nebr. 126; *Sorg v. Pfalzgraf*, *supra*.

Appellant urges that Porter and Trask should have been made parties defendant, which was not done, although the petition stated that they had an interest in the premises involved. The statement in the petition was notice to appellant that Porter & Trask might be interested in the disbursement of the fund. If they were necessary parties appellant had adequate notice of such fact, and should have raised the question of non-joinder in the court below, or, if, as appellant contends, they had a suit for a lien then pending on the

same premises, it could have moved the court that the causes be consolidated. This was not done, and the question was first raised on the final hearing. When thus delayed, such an objection does not receive favor from the court, and in such cases to be of avail it must appear that the decree will have the effect of depriving the appellant of its legal rights. *Pease v. Chicago Crayon Co.*, 235 Ill. 391.

The original contract required the building to be completed by December 1, 1905. It was not completed on that date. It was completed April 16, 1906, when, the proof shows, appellant first demanded a statement from the original contractor. The statement was furnished and it showed the claim of appellee and the amount to become due, and therefore it was unnecessary for appellee to serve upon appellant notice of his claim. Sec. 24, Mechanic's Lien Act. Prior to this appellant had paid the original contractor the sum of about \$12,000 without first obtaining the statement required by Sec. 24. These payments were not lawful as against appellee. Sec. 32, Mechanic's Lien Act. The contract was not entirely finished as to appellee's work until May 18, 1906. On July 3, 1906, appellee served on appellant the subcontractor's notice as required. It is urged by appellant that this notice should have been served within sixty days after December 1, 1905, and therefore there could be no lien under the contract. The proof shows that appellant, when it was found the building was not going to be completed by the time mentioned in the contract, took no steps to forfeit the contract, but said to the contractor to go ahead, and it is apparent from the record that there was an implied extension of the time for its completion. If this be true, and as the statement of April 16, 1906, correctly stated appellee's claim, it would seem that no notice was necessary, but it is clear that appellee did serve a notice, the form of which is not objected to, within sixty days after he completed his work. We are therefore of the opinion that he did not lose his right to a lien by reason of failure to give notice.

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Respecting the extras claimed by appellee, the evidence of the architect shows that the claim for extras was made by the original contractors, and adjusted with appellant. Appellant should have considered in that adjustment that appellee was furnishing part of the extras and should have kept enough out of the settlement to indemnify it if compelled to pay subcontractors, if a lien was sought for extras, but it did not do this, consequently it cannot now complain.

The court adjudged that the property owners should pay the lien holder's attorney the sum of \$76 as fees, in accordance with a provision made by the last sentence of section 17 of the Mechanic's Lien Act (Par. 31), which provides, "In all cases where liens are enforced, the court shall, in its discretion, order reasonable attorneys' fees taxed as a part of the costs in favor of the lien creditor." Since the rendition of judgment in this case in the court below, the Supreme Court in *Manowsky v. Stephan*, 233 Ill. 409, said, referring to this sentence, "We have reached the conclusion that the sentence in question is in violation of the State constitution * * *. It is special legislation. It confers a right upon persons entitled to liens by virtue of the Mechanic's Lien law, and confers that right upon no others * * *. We regard the last sentence of the section of the statute above set out as in conflict with section 22 of article 4 of the constitution of the state." The decree directed the attorney's fees to be paid direct to Charles E. Sturtz, attorney for appellee. If an allowance for attorney's fees had been proper, the decree should have directed it to be paid to the party to the suit who had incurred the liability for solicitor's fees. It follows that the allowance for solicitor's fees, designated as attorney's fees in the decree, must be reversed. No other harmful error appearing in the record the decree, in all other respects, is affirmed, one half of the costs of this court to be paid by appellee.

Affirmed in part, reversed in part.

**Porter & Trask, Appellees, v. Western Tube Company,
Appellant.****Gen. No. 4,998.**

This case is controlled by the decision in *Granquist v. Western Tube Company*, *ante* p. 230.

Mechanic's Lien. Appeal from the Circuit Court of Henry county; the Hon. EMERY C. GRAVES, Judge, presiding. Heard in this court at the April term, 1908. Affirmed in part, reversed in part. Opinion filed October 14, 1908.

KNAPP, HAYNIE & CAMPBELL, CHARLES K. LADD and MARK BREEDEN, JR., for appellant.

POMEROY & DEMERATH, for appellees.

MR. JUSTICE WILLIS delivered the opinion of the court.

This is an appeal from the Circuit Court of Henry county to review a decree of that court allowing appellees, James Porter and Harry W. Trask, subcontractors, a mechanic's lien on property owned by appellant, the Western Tube Company.

On June 20, 1906, appellees filed in said court a bill against the Western Tube Company and Frederick H. Mathews and Charles F. McMullen, co-partners, doing business as the Mathews Construction Company, to establish and foreclose a subcontractors' mechanic's lien for lumber and building materials furnished on a building erected on lots one and two, of block thirteen, of the original town, now city of Kewanee. The bill alleged that on or about June 28, 1905, appellant entered into a written contract with the Mathews Construction Company to erect an office building on its premises according to certain plans and specifications, a copy of which contract was attached to the bill. The contract provided that the building was to be constructed according to said plans and specifications and finished by Decem-

ber 1, 1905, and in the event of failure to complete the building by that date, unless delayed by certain causes therein enumerated, a forfeiture of \$5 per day was stipulated for. The contract price for the construction of said building was \$16,400. The bill further alleged that on June 29, 1905, appellee entered into a verbal subcontract with the Mathews Construction Company to furnish the lumber and mill work necessary for the execution of said contract for the sum of \$3350 and to furnish such extra material as was needed, the price therefor not to exceed the fair market value of the same, to be delivered and payment made therefor, within three years from the furnishing of the first of such material, and that in accordance with the terms of said subcontract they delivered upon appellant's premises between July 3, 1905, and March 9, 1906, the material so contracted for, and also delivered between June 29, 1905, and February 21, 1906, extra material to the amount of \$621.17; and that said office building in the construction of which such material was used, was constructed on lot one and a part of lot two in block thirteen, in the original town, now city of Kewanee, of which appellant was the owner, and that there was due and unpaid on said contract, \$1717.73, and that on April 16, 1906, the Mathews Construction Company rendered to appellant a verified statement in writing of the names of all parties furnishing labor or materials and of the amounts due or to become due each, which was delivered to appellant within sixty days after the final delivery of the materials by appellees. Appellant answered the bill and admitted the contract between it and the Mathews Construction Company, substantially as set up in the bill, but denied that the Construction Company ever completed said building and alleged that it was not completed according to the contract, and that said contract had not been performed by the Construction Company, and admitted that it owned the premises, and disclaimed knowledge as to the contract between appellees and the Construction Company

and its indebtedness to appellees, and denied that legal notice was served on it, stating the amounts due and owing to the said Construction Company, and the names of the persons furnishing labor or material for the construction of said building, and stated that it had no knowledge that appellees furnished material, and that it was not advised and could not state whether appellees furnished material and labor in the construction of the buildings, and denied that it was indebted to appellees or that they were entitled to a lien. Appellees filed a general replication to appellant's answer, and the bill was taken as confessed as to Mathews and McMullen. The cause was referred to the master to take proof and report the evidence and his conclusions of law and fact. The master heard the proof and reported that appellees were entitled to a lien on lots one and two of block thirteen of the original town, now city of Kewanee, on account of materials furnished in the erection of the building thereon.

To this report, appellant filed a number of objections, one of which was that it appeared from the evidence that no part of the building was on lot one, but that it was on lots two and three. This objection was held to be good and the master amended his report and found that the lien should be allowed on lot two and overruled appellant's other objections. There was a hearing before the court upon the master's report and the exceptions thereto. The court approved his finding, and entered a decree granting appellees a lien for \$1717.73 on lot two and \$171.77 to appellees' counsel as attorney's fees. From this decree the Western Tube Company appealed.

Appellant first contends that the decree is erroneous, because it found that a lien should be allowed on lot two whereas the bill alleged that the building was erected on lots one and two, on the ground that appellees were bound by the allegation in the bill, that to entitle them to recover they must prove the whole allegation, and that appellees failed in this because the

evidence did not show that the building was erected on lots one and two but did show that it was erected on lot two, on the alley between lots two and three, and on a part of lot three.

Counsel for appellant contends that a subcontractor can have a lien the same as the original contractor under section one of the Mechanic's Lien Act of 1903, which provides that a lien may be had upon the whole of such lot or tract of land and upon the adjoining or adjacent lots or tracts of land of such owner, constituting the same premises, and occupied or used in connection with such lot or tract of land as a place of residence or business; and in case the contract relates to two or more buildings, or two or more lots or tracts of land, upon all of such lots and tracts of land and improvements thereon, for the amount due with the interest thereon, and that that means a lien must be taken upon all the premises occupied by the building or none.

We cannot agree with counsel on this proposition. In *Sorg v. Pfalzgraf*, 113 Ill. App. 569, a suit to enforce a mechanic's lien, the bill located the house on lots nine and ten. On the trial it developed that it stood on lots eight and nine and not on lot ten. It was then too late to enforce a lien against lot eight. The court ordered a decree against lot nine only. We there said, the owner cannot be permitted to defeat the lien upon his land which the law has given the builder simply because the builder might have obtained a lien upon more of the owner's land.

It does not appear that Granquist's rights were prejudiced by the decree in this case, unless, as urged by appellant, Granquist should share *pro rata* with the other subcontractors in the amount shown to be due by the statement made by the Construction Company on April 16, 1906. Section five of the Mechanic's Lien Law of 1903, makes it the duty of the owner to require of the contractor, before he, or anyone for him, shall pay or cause to be paid to said contractor, or for him, any moneys or other consideration due, or to become

due such contractor, or make or cause to be made any advancement of any moneys or other consideration, a statement in writing, under oath, or verified by affidavit, of the names of all parties furnishing material and labor and the amounts due or to become due each. The proof shows that appellant was to pay the Construction Company \$16,400 for the construction of the building, and that before obtaining the statement required by section five, appellant paid the original contractor, \$13,000. As against subcontractors and material men these payments were unlawful. Nutriment Company v. George Green Lumber Co., 94 Ill. App. 342. For that reason Granquist cannot be required to share *pro rata* in the amount remaining after such unlawful payments.

The bill did not state that Granquist was interested in the premises, but the evidence disclosed that he had a claim as a subcontractor. From this, appellant argues that appellees did not meet the requirements of section 11 in that Granquist was not made a party. If he was a necessary party, appellant had adequate notice of such fact and should have raised the question of non-joinder of parties in the court below. Or, if, as appellant now contends, Granquist's suit for a lien was then pending, it could have moved the court below that the causes be consolidated. The objection was first raised on the final hearing. When thus delayed such an objection does not receive favor from the court, and in such cases to be of avail it must appear that the decree will have the effect of depriving the appellant of its legal rights. Pease v. Chicago Crayon Co., 235 Ill. 391.

Appellant contends that since the contract required the building to be completed December 1, 1905, final payment should have been made at that time, and a suit to enforce a lien should have been brought within four months thereafter; that the material furnished after December 1, 1905, was not furnished under the original contract, but under some other, and that the time of payment for such material is not shown. The proof

shows that appellant did not declare a forfeiture of the contract, as it might have done, for failure to complete the work by December 1, 1905, but let the work go on and adjusted the penalty with the contractor April 12, 1906; that the final payment was to be made upon the completion of the building, and that it was completed and accepted April 16, 1906, and that the final delivery of material under the estimate was made March 23, 1906, and the final delivery of extra material March 9, 1906. This suit was commenced June 20, 1906, within the four months period required by section 33.

Respecting the extras claimed by appellee, the evidence of the architect shows that the claim for extras was made by the original contractors and adjusted with appellant. Appellant should have considered in that adjustment that appellees were furnishing part of the extras, and should have kept enough out of the settlement to indemnify it if compelled to pay subcontractors, if lien was sought for the extra work, but appellant did not do this, consequently it cannot now complain.

The court adjudged that the property owners should pay the lien holder's attorney the sum of \$171.77 as fees, in accordance with a provision made by the last sentence of section seventeen of the Mechanic's Lien Act (par. 31), which provides: "In all cases where liens are enforced, the court shall, in its discretion order reasonable attorneys' fees taxed as a part of the costs in favor of the lien creditor." Since the rendition of judgment in this case in the court below, the Supreme Court in *Manowsky v. Stephan*, 233 Ill. 409, said, referring to this sentence, "We have reached the conclusion that the sentence in question is in violation of the state constitution * * *. It is special legislation. It confers a right upon persons entitled to liens by virtue of the Mechanic's Lien Law, and confers that right upon no others * * *. We regard the last sentence of the section of the statute above set out as in conflict with section 22 of article 4 of the constitution of the state." The decree directed the attorney's fees to

be paid direct to Pomeroy & Demerath, attorneys for appellee. If an allowance for attorney's fees had been proper, the decree should have directed it to be paid to the party to the suit who had incurred the liability for solicitor's fees. It follows that the allowance for solicitor's fees, designated as attorney's fees in the decree, must be reversed. No other harmful error appearing in the record, the decree in all other respects is affirmed, one half of the costs of this court to be paid by appellee.

'Affirmed in part, reversed in part.

**John A. Goodmanson, Appellee, v. Louis Rosenstein,
Appellant.**

Gen. No. 5,029.

1. **BROKERS AND FACTORS**—*when real estate commissions earned.* It is not a question as to whether the real estate broker has obtained a contract which may be specifically enforced by the owner which determines his right to commissions; if he has procured a customer who is ready, willing and able to buy the property at the terms designated by the owner, he is entitled to recover his commissions.

2. **AGENCY**—*when absolute revocation unauthorized.* An agency for a definite period cannot be terminated by the principal without compensating the agent.

Assumpsit. Appeal from the County Court of Rock Island county; the Hon. ROBERT W. OLMSTED, Judge, presiding. Heard in this court at the April term, 1908. Affirmed. Opinion filed October 14, 1908.

PEEK & DIETZ, for appellant.

GEORGE W. WOOD, for appellee.

MR. JUSTICE WILLIS delivered the opinion of the court.

This is an appeal from the County Court of Rock Island county, to review the judgment of that court al-

lowing appellee, John A. Goodmanson, to recover the sum of \$1000 against appellant, Louis Rosenstein, on account of commissions for the sale of real estate in the city of Moline.

On November 22, 1905, appellee filed a declaration in assumpsit containing the common counts and two special counts, to which appellant interposed the general issue, and a demurrer to the special counts. The demurrer was overruled and appellant filed two special pleas to the first special count. Appellant demurred to the special pleas and the demurrer was sustained. On the trial, the jury found the issues for appellee and assessed his damages at \$1000. A motion for a new trial was denied, judgment was entered on the verdict, and an appeal was taken to this court.

The evidence shows that appellee, Goodmanson, was a real estate agent in the city of Moline; that he met Rosenstein, appellant, who was engaged in the clothing business, and owned and occupied a three story brick building known as the "Rosenstein Block" in that city. Appellant informed appellee that he wished to sell his building, for which he would take \$50,000. Appellee asked appellant if he would pay him a commission in case he should find a purchaser, and he said he would. Later, appellant told appellee he must not publicly advertise the property as he was afraid it would injure his business if it was generally known that he was trying to sell, and appellee promised to do all he could towards selling the property by making a "still hunt." About two weeks later, appellee learned that the Moline Trust & Savings Bank was looking for a new location and talked with one of its officers about the bank buying appellant's property. Thereafter, on October 18, 1905, appellee obtained from appellant written authority to make the sale within six months for the sum of \$50,000 at a commission of 2%. Appellee, in his negotiations with the officers of the bank, learned that a meeting of the directors would be necessary before the bank could act, and thereupon gave

H. A. Ainsworth, president of the bank, a written option to purchase the premises within sixty days for \$50,000. Early in November, appellant, hearing that the bank had an option on the property, asked appellee the date of his written authority to sell the same. Appellee gave him the date, and also told him that he had the property about sold. Thereafter appellant served appellee with a notice purporting to revoke the authority to sell. On November 23, 1905, the president of the bank tendered to appellant \$50,000, and demanded a deed. Appellant did not accept the money and refused to make a deed.

The question at issue in this case is not whether or not the contract with the bank through Ainsworth can be enforced by specific performance, but whether or not appellee can recover the commissions stipulated for in written authority of October 18, 1905. With the question of the validity of appellee's contract to Ainsworth we are not concerned on this hearing, notwithstanding appellant's theory that the contract cannot be specifically enforced.

Under appellee's authority to sell, he had six months in which to sell the property for \$50,000, and earn the 2% commission. Within that time he found a purchaser, ready, able and willing to buy, as is evidenced by the tender of the \$50,000 and the demand for a deed. He thereby earned the commission. Appellant might refuse to carry out the contract of sale made by his agent, but this would not release him from paying the commissions earned. The fact that the tender was made after the commencement of the suit is immaterial. The revocation cannot affect his right to recover his commission, for his agency was for a definite time, and could only be terminated by appellant's default, as there was no provision to terminate it before the six months. *Rand v. Cronkrite*, 64 Ill. App. 208. Appellee had done some work towards securing a purchaser before he obtained the written authority to sell, and the evidence shows he had secured a purchaser before his

authority was revoked. We are of the opinion that appellee did all that was necessary to entitle him to recover the commissions stipulated for in the writing of October 18, 1905.

We have examined the authorities cited by counsel for appellant, but as this is an action in assumpsit, we think they have no application. In *McEwen v. Kerfoot*, 37 Ill. 538, the court held that after an agent's agreement had been repudiated, while he should go no further, nevertheless, the agent was entitled to his commissions for the sale made by him within his authority.

The finding of the jury that appellee procured a customer, ready, able and willing to purchase the property is fully sustained by the evidence.

Finding no material error in the record, the judgment is affirmed.

Affirmed.

The People of the State of Illinois, ex rel. B. R. Johnson, Plaintiff in Error, v. Daniel Blake, Defendant in Error.

Gen. No. 5,032.

1. CONSTITUTIONAL LAW—*who ineligible to hold state office.* Any person holding under the United States government the office of post-master with an annual compensation in excess of \$300 is ineligible to hold at the same time the office of president of the village board of trustees.

2. QUO WARRANTO—*what essential to right to file information.* Only probable cause is required to be shown to entitle a proper application for leave to file an information; unless an absolute showing is made against the application, leave should be granted.

3. QUO WARRANTO—*what should not be determined upon application for leave to file information.* While affidavits and counter-affidavits may properly be heard upon an application for leave to file an information, the court should not, upon such preliminary hearing, try or determine the merits of the controversy.

4. STATE'S ATTORNEY—*when presence of, at proceedings not es-*

The People v. Blake, 144 App. 246.

sentia. Proceedings which are required by law to be conducted in the name of the attorney-general or the state's attorney, may be conducted by others in his behalf.

Petition for quo warranto. Error to the Circuit Court of Livingston county; the Hon. GEORGE W. PATTON, Judge, presiding. Heard in this court at the April term, 1908. Reversed and remanded with directions. Opinion filed October 14, 1908.

A. C. BALL, State's Attorney, and A. C. NORTON, for plaintiff in error.

WHITE & TUESBURG, for defendant in error.

MR. JUSTICE WILLIS delivered the opinion of the court.

This is an appeal from the Circuit Court of Livingston county to reverse the judgment of that court in refusing to grant leave to A. C. Ball, state's attorney of Livingston county, at the relation of B. R. Johnson, to file an information in the nature of *quo warranto* against Daniel W. Blake, appellee, to have him show by what right he claims to hold and execute the duties of the office of president of the board of trustees of the village of Cornell in Livingston county.

On May 25, 1907, the following petition was filed in the Circuit Court of said county:

"STATE OF ILLINOIS, { CIRCUIT COURT
Livingston county, } ss. May Term, A. D. 1907.

Now comes A. C. Ball, State's Attorney in and for said county of Livingston and State of Illinois, on the relation of B. R. Johnson, and shows to this Honorable Court that one Daniel W. Blake has since the 6th day of May, 1907, in the county aforesaid unlawfully held and executed, and still does hold and execute, without any warrant or right whatever, the office of President of the Board of Trustees of the village of Cornell, an incorporated village of said county and state; and in support of said showing presents herewith the affidavit of B. R. Johnson hereto attached and made part hereof, and asks leave of the court for leave to file an infor-

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mation in nature of a *quo warranto* in the name of the people of the State of Illinois.

(Signed) A. C. BALL,
State's Attorney for Livingston county."

With the above petition was the affidavit of B. R. Johnson, relator, the body of which was as follows:

"B. R. Johnson on oath states that he is and has been for many years last past, a resident of and a qualified voter in the village of Cornell, an incorporated village situated in the county of Livingston and State of Illinois.

"Affiant further states that on the 16th day of April, 1907, a village election for the election of a president of the Board of Trustees of said village was held in said village of Cornell, and at said election one Daniel W. Blake was declared elected to the office of president of the Board of Trustees, and that afterwards or about the 6th day of May, 1907, the said Daniel W. Blake qualified, took the oath of office as such president of the Board of Trustees of the said village of Cornell, and began exercising the office of president of the said Board of Trustees of said village, and has ever since been and is still acting as such.

"Affiant further states that on the 16th day of April, 1907, and for several years continuously prior thereto, and from that time down to the present, the said Daniel W. Blake has continuously held, and still holds, an office under the Government of the United States, said office being that of postmaster, at the post-office of Cornell in said county and state.

"Affiant further states that for several years last past and at the present time, the annual compensation of said Daniel W. Blake, as such postmaster, has exceeded the sum of \$300 and still exceeds that sum; and the said Daniel W. Blake, while exercising the office of president of the Board of Trustees of said village has at the same time been, and was for a long time prior thereto, holding the said office of postmaster, and is still holding and exercising the same."

On June 6, 1907, a rule was entered requiring appellee to show cause by June 10, why leave should

not be granted to appellant to file said information. On June 10, appellee appeared by counsel to resist the granting of leave to file the information, and filed an affidavit, the body of which was as follows:

“Daniel W. Blake, being duly sworn, on oath states that he is the Daniel W. Blake, who is the defendant in the above entitled cause and affiant states that on the 16th day of April, 1907, he was elected to the office of president of the Board of Trustees of the village of Cornell, in the county and state aforesaid, and that on or about the 6th day of May, 1907, he duly qualified and took the oath of office as such president and began exercising and is now exercising the office of president of the Board of Trustees of said village.

“Affiant further states that he is now and has been for several years last past, postmaster of the said village of Cornell.

“Affiant further states that neither at the present time nor during any of the several years during which he has been such postmaster, has the net annual compensation as such postmaster, after paying clerk hire and other expenses of said office, exceeded the sum of \$300 per annum, but that for each year during which he has held said office, the said net compensation has been less than \$300 per annum.”

Leave was given by the court to file additional affidavits by appellee and to appellant to reply. Appellee filed affidavits showing that the relator was present at the meeting of the board of village trustees and concurred in the action of approving the bond of appellee and in other official matters of appellee. He also filed affidavit showing the receipts of the office of postmaster, and giving the various items, also affidavit showing the rental value of the property occupied by the post-office and the reasonable value of clerk hire, etc., about the conducting of the post-office.

Appellant filed affidavits denying the statements in affidavits of appellee in regard to the rental value of the post-office and the necessity of clerk hire and other things. Motions were made to strike all the affidavits from the files and after the hearing upon the affidavits the court took the case under advisement and on De-

cember 14, 1907, denied the prayer of the petition and refused leave to the appellant to file the information and gave the following reasons:

First, because the state's attorney at no time appeared in said cause and had no connection with it observable to the court, except signing the petition; second, the evidence fails to show the net salary of the defendant, and if it has at any time equaled \$300. To the order of the court in denying the leave appellant excepted, and prayed an appeal to this court, which was allowed.

The petition, as filed by state's attorney A. C. Ball, was in the proper form and the affidavit of the relator B. R. Johnson stated that appellee held and executed the office of the president of the village board of trustees, and was at the same time holding and executing the office of postmaster of the village of Cornell. The Constitution of the State of Illinois, article 4, section 3 provides: "Nor shall any person holding any office of honor or profit under any foreign government or under the government of the United States, except postmaster (whose annual compensation does not exceed the sum of \$300) hold any office of honor or profit under the authority of this state."

Appellee admitted in his affidavit that he held two offices, but denied that his net annual compensation as postmaster was over \$300, and from the other affidavits filed an issue of fact was raised, and upon which there was dispute, and as our statute only requires probable grounds for granting leave to file the information, we think leave should have been given to file the information, as this was shown by the affidavit.

While it is the proper practice to file affidavits and counter affidavits on the motion for leave to file an information (People ex rel. v. North Chicago Railway Company, 88 Ill. 537, People ex rel. Lewis v. Waite, 70 Ill. 25), the merits of the case should not be tried on the preliminary hearing.

The law is that when the rule *nisi* is entered unless cause is shown such as puts the matter beyond dispute

the court should make the rule absolute for the information in order that the question concerning the right may be properly determined (17 Ency. Pleading and Practice, 451; Attorney General v. C. & E. R. R. Co., 112 Ill. 520-535); then the case can be heard and tried the same as any other case when the evidence may be produced by witnesses and cross-examination be allowed. It is therefore unnecessary for us to express any opinion on the merits of the case on this appeal.

There is another question which demands our consideration, that of the parties and the conduct of a proceeding of this kind. Our statute permits no case of this kind to be instituted except by the attorney-general of the state, or the state's attorney of the county in which it is brought. From this provision the trial court evidently thought it was the duty of the state's attorney to prosecute this case in person. In this he is mistaken. It is only necessary that the case shall be carried on in the name and by the authority of the People of the State of Illinois and as long as it is carried on in the name of the People under the name of the state's attorney, it is immaterial whether he is personally present at all proceedings in the case or not. *Chesshire v. People ex rel.*, 116 Ill. 493-500; *McGahan v. People ex rel. Deneen*, 191 Ill. 493.

The petition in this case and the proceedings were according to law. This was a proceeding in which the public was interested, and the mere fact that there was a relator and another attorney in the case would make no difference. The state's attorney had a right to let his name be used in the proceeding if he thought proper, and to do as little or much in the actual trial of the case as he deemed proper, and the court erred in holding that he had to be personally present to conduct this proceeding.

The judgment of the Circuit Court is reversed and the cause remanded with directions to the Circuit Court to grant leave to appellant to file the information.

Reversed and remanded with directions.

Hedenberg v. Nash, 144 App. 252.

J. C. Hedenberg, Appellant, v. Nora Nash, Appellee.
Gen. No. 5,048.

1. EVIDENCE—*what essential to admission of secondary.* In order to let in secondary evidence of the contents of a written instrument, the person in whose possession it was last traced, must be produced, unless shown to be impossible, in which case, search among his papers must be proved if that can be done.

2. LIBEL—*when published article not competent.* A newspaper containing an alleged libelous article is not competent against an individual not connected with the paper which caused the publication of such article if the same was set up from the manuscript copy prepared by such individual, unless the non-production of such manuscript copy is duly accounted for.

Action on the case. Appeal from the Circuit Court of Knox county; the Hon. ROBERT J. GRIER, Judge, presiding. Heard in this court at the April term, 1908. Affirmed. Opinion filed October 14, 1908.

W. T. SMITH and ROBINSON & LEWIS, for appellant.

EUGENE W. WELCH, for appellee.

MR. JUSTICE WILLIS delivered the opinion of the court.

This was an action on the case by appellant, J. C. Hedenberg, against appellee, Nora Nash, to recover damages for causing the publication of an alleged libelous article in a Galesburg newspaper. On the trial at the close of appellant's testimony in chief, the court, on the motion of appellee, instructed the jury to return a verdict of not guilty, and such a verdict was returned, on which judgment was entered. From this judgment Hedenberg appealed.

The declaration contained one count and alleged that appellee caused to be published on August 29, 30 and 31, 1907, in the Daily Republican Register, a newspaper published in Galesburg, Illinois, having a circulation of five thousand copies, the following item:—

“Renters—J. C. Hedenberg vacated 214 South street owing \$40.00 rent. He denied it and showed forged receipts to the constable. He now resides on Garfield avenue.” The declaration averred the same was a false, scandalous and defamatory article, etc.

To the declaration appellee interposed the plea of not guilty, and a plea of justification. Appellant replied to the plea of justification, and issues were joined. On the trial the original manuscript of the alleged libelous article was not produced, but appellant proved the publication in the Galesburg Daily Register of the articles set out in the declaration, and the circulation of the paper on the days mentioned; that appellee brought the article to the office of such newspaper, and paid for its publication, and that appellee had admitted that she had caused such an article to be published. He then offered in evidence the published article counted on in the declaration, to which appellee objected. The court sustained the objection on the ground that the proper foundation had not been laid for the introduction of secondary evidence. Appellant made several further attempts to lay the necessary foundation for the admission of the published article, but the court, on appellee's objection, refused to admit it; thereupon appellant rested, and on the motion of appellee, the court directed the jury to return a verdict of not guilty.

The only question in this case for our consideration is, whether or not the court erred in refusing to admit the published article in evidence. Counsel for appellant urges that it should have been admitted because the evidence shows that the original manuscript of the article could not be found, and that the admission of appellee in regard to it made the published article admissible in the absence of the original manuscript.

The rule is, “In order to let in secondary evidence of the contents of a written instrument, the person in whose possession it was last traced, must be produced, unless shown to be impossible, in which case, search

among his papers must be proved if that can be done." Prussing v. Jackson, 208 Ill. 85.

The record discloses that one Robbins, connected with the paper, testified that it was customary, when notices for publication came in, to take them to the composer's room, and put them on the copy hook, to be set up on a type-setting machine; that ordinarily the original would be kept until the following night, and then thrown into the waste paper basket. He could not, however, say what was done with the manuscript of this particular article. One Custer, another employe of the paper, testified that he had charge of the circulation of the newspaper, and that it was customary to place the copy on the hook, from which it was taken by the men in the composing room and set in type. It was preserved until the next day to see if there were any objections. If there were none from any of the advertisers, it was destroyed, thrown in to the waste-paper basket and hauled away. He said he looked in the safe, through his files and in the place where they kept copies and letters or copies of letters, but was unable to find it. His testimony does not show what was done with this particular manuscript, as to whether there was any objection in this case or whether this copy took the course he testified was the rule. Neither the manager of the composing room, nor any of the compositors were called and inquired of if they knew what was done with the copy after it was set in type. This evidence was insufficient to show appellant's inability to produce the original manuscript.

From this evidence, it is shown that the original manuscript was last in the possession of the employes of the composing room, that is of the one who took it from the copy hook to set it in type, and that person was not called, nor was it shown to be impossible to call him or the other compositors. The evidence was not sufficient to show appellant's inability to produce the original manuscript and thus lay the foundation

for the admission of secondary evidence of the contents of the published article.

Counsel for appellant urge that the published article should have been admitted for the reason that appellant proved appellee's admission that she prepared the article and sent it to the newspaper, and that after it was printed, her attention was called to it, it being read to her, and that she said that she had taken it to the office and had it printed. This question is no longer an open one in this state as will be seen from the opinion in the case of Prussing v. Jackson, *supra*, where the authorities are reviewed. A further discussion of the law on that point in this case is therefore unnecessary, and we will content ourselves by quoting from that case the following: "To hold the testimony of the plaintiff that the defendant said to or in the hearing of such plaintiff that a writing material to be produced in evidence contained certain statements to be sufficient to deprive the defendant of the right to be judged by the writing itself, is to abrogate in its entirety the rule that the contents of a written instrument cannot be proved by parol in the absence of proof accounting for and excusing the non-production of the writing." This, in our opinion, fully answers appellant's contention.

There being no evidence before the jury upon which they could find a verdict, there was no error in the court directing them to return a verdict in favor of appellee. The judgment is therefore affirmed.

Affirmed.

Minnie C. Coulter, Appellee, v. Travelers' Protective Association of America, Appellant.

Gen. No. 4,928.

1. **PLEADING**—*when special plea not essential.* It is not necessary to plead specially any defense that may properly be offered under the general issue; a demurrer is properly sustained to a

Coulter v. Travelers' Protective Association, 144 App. 255.

special plea which interposes a defense admissible under the general issue.

2. PLEADING—*what defenses admissible under general issue.* Payment and a release may be offered in evidence under the general issue.

3. PLEADING—*when provision of constitution of fraternal benefit society not considered.* A section of the constitution of a fraternal benefit society pleaded in connection with a release set up by way of defense to an action instituted upon a certificate, will not be considered if the logical connection or effect between such section of the constitution and the release is not averred.

4. FRATERNAL BENEFIT SOCIETIES—*when release does not discharge death claims.* A release in full by a member for benefits to which he was entitled by virtue of injuries does not discharge the right of the beneficiary to recover death claims if death ensued from such injuries.

5. FRATERNAL BENEFIT SOCIETIES—*when full death claim should not be awarded.* If the full liability provided for by a certificate is \$5,000, such amount should not be allowed if prior to death, benefits with respect to the accident which caused the death of the member, had been paid to him.

6. EVIDENCE—*what competent as admission against interest.* Proofs of loss containing answers by a physician, sworn to as true by the beneficiary, are competent against her as admissions against interest, and the defendant offering them may select such portions as it sees fit and offer the same, if material, subject to the right of such beneficiary to offer such other parts of the document as qualify or modify such admission or declaration against interest.

7. INSTRUCTIONS—*what proper in action upon accident benefit certificate providing for non-liability when death results wholly or in part from disease.* In such a case an instruction is proper which tells the jury that though they believe from the evidence that the death of a member was caused in part by bodily infirmity or disease, yet that if the jury further believe from the evidence that said member received accidental injuries and that such bodily infirmity or disease was caused by or was a natural, direct, proximate and necessary result of such accidental injuries, and that such accidental injuries were the direct cause of his death, then the fact that such bodily infirmity or disease contributed to cause the death of such member, would not constitute a defense to the action.

Assumpsit. Appeal from the Circuit Court of Rock Island county; the Hon. WILLIAM H. GEST, Judge, presiding. Heard in this court at the October term, 1907. Reversed and remanded. Opinion filed April 14, 1908. Rehearing denied October 14, 1908.

Statement by the Court. This is an action in assumpsit brought by Minnie G. Coulter of Rock Island, Illinois, appellee, against the Travelers' Protective Association of America, appellant, for five thousand dollars indemnity, on a certificate of membership for the death of her son, Harry W. Coulter. The declaration was filed to the January term, 1905, of the Rock Island Circuit Court. It alleges that the Travelers' Protective Association of America is a fraternal beneficiary society or corporation organized under the laws of the state of Missouri, and doing business in the state of Illinois, by virtue of the statutes of Illinois in such case made and provided; that on June 21, 1902, said defendant company executed and delivered to one Harry W. Coulter, deceased, the son of plaintiff, its benefit certificate or policy, to wit, a certificate of membership in said association, in and by which it is provided and agreed by said defendant association that said Harry W. Coulter is entitled to all the benefits accruing from such membership under the provisions of the constitution and by-laws of said association, said benefits, in case of the death of said Harry W. Coulter, being payable to plaintiff under the name of Minnie G. Coulter as therein stated; that at the time said certificate was so executed and delivered to said Harry W. Coulter and from thence hitherto the by-laws of said defendant association in that behalf, provided that five thousand dollars shall be paid to the beneficiary named in the certificate of any deceased member in case of the death of said member by accident, provided such death shall occur within three months after such accident and such accident be within the conditions and limitations of the benefit certificate. Plaintiff avers that, to wit, June 1, 1904, while said benefit certificate was in full force, the said Harry W. Coulter received by accident, while about his business as a traveling salesman riding on a railway train and not in any manner or while engaged

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in any occupation prohibited by the rules or conditions of said certificate, a bruise on and sprain of the back and divers internal injuries, from the effect of which accident said Harry W. Coulter thereafter on August 24, 1904, died. It is further averred that Harry W. Coulter kept and performed on his part all the conditions and requirements in accordance with the terms of said certificate and of the constitution and by-laws of said association; that within four days after receiving said accident said Harry W. Coulter notified the defendant of the particulars of the same and gave the defendant the name of his attending physician; that the plaintiff notified defendant of said death of deceased, and made the proofs required by defendant on blanks furnished by defendant for that purpose; by means whereof the defendant became liable, etc. A copy of the certificate of membership, it being No. 43406, is attached to the declaration. On the back of the certificate is a set of rules specifying in what instances the defendant shall not be liable. One of these rules is: The member agrees that the Travelers' Protective Association of America shall not be liable for injuries incurred by a member in an occupation more hazardous than specified in his application * * * or death or disability when caused wholly or in part by any bodily or mental infirmity or disease.

The defendant filed the plea of the general issue with six special pleas. The second special plea avers that the plaintiff has no cause of action because, under the terms of the certificate issued to Harry W. Coulter, said Coulter was entitled to all benefits accruing from his certificate of membership under the provisions of the constitution and by-laws of defendant as in the declaration set forth; that at the time said certificate was issued and at the time of said injuries and death the constitution contained the following provisions: Section 7. "All claims for benefits or indemnity under the benefit certificate of a member and this constitution

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must be made to the National Board of Directors on the regular blank furnished by the board. *Such claims are not divisible and must be presented after the total recovery of the member or after his death;*" that after said Coulter received the injuries mentioned in the declaration he notified defendant of said injuries for the purpose of obtaining full payment of his benefits; that after he notified defendant of said injuries, defendant on the 16th day of July, 1904, during the lifetime of said Coulter, for the purpose of making full satisfaction, discharge and payment for said injuries issued to him a draft for the sum of \$75 in words and figures as follows, to wit, "Travelers' Protective Association of America. St. Louis, Mo., July 16, 1904. This check will not be paid if detached from receipt or if the receipt is not signed by the claimant." Here follows the draft for \$75 which is followed by the words, "This check will not be paid if detached from the receipt, or if the receipt is not signed by the claimant." It is further averred, that after said draft was received said Coulter on the 19th day of July, 1904, executed and delivered to the defendant a release and discharge of his claim to said defendant, which said release is in words and figures as follows, to wit:

"Claim No. 8324. Certificate No. 43406. Know all men by these presents, that I Harry W. Coulter in consideration of the sum of seventy-five dollars to me paid by the Travelers' Protective Association of America the receipt whereof is hereby acknowledged, do hereby release and forever discharge said Travelers' Protective Association of America from all liability for or on account of accidental injuries received by me on or about the first day of June, 1904. Witness my hand and seal at Rock Island Ill. this 19th day of July, 1904.

Done in the presence of

W. J. Coulter.

HARRY W. COULTER,
Claimant."

That by the terms of said release said Harry W. Coulter did then and there release all claims, demands

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and causes of action which he then had against the defendant, or might thereafter have or allege against it and did release and discharge to defendant any claim or demand plaintiff might thereafter have or allege against it for said injuries. The first special plea is the same as the second except that in the first no reference is made to the clause of defendant's constitution set up in the second special plea. The other four special pleas plead the rule on the back of the certificate that the defendant is not liable for death or disability when caused wholly or in part by any bodily or mental infirmity or disease, and aver in different forms that said Coulter did not die solely from the effects of the accident and injuries mentioned in the declaration but that his death was caused in part by the disease known as typhoid fever. A demurrer was sustained to the first and second special pleas, and replications were filed to the other pleas. After the evidence for the plaintiff was closed, the declaration was amended by changing the allegation that the deceased was injured while riding on a railway train to "in a manner to plaintiff unknown." The original pleas were refiled, with two additional special pleas averring contractual limitations. A demurrer was filed and sustained to the first, second and seventh special pleas, and issues joined upon the others. A verdict was returned for plaintiff for \$5537.50. The defendant made a motion for a new trial. The plaintiff remitted \$83 and the court overruled the motion for a new trial and rendered judgment for \$5454 in favor of plaintiff. Exceptions were properly preserved by the defendant who brings the case to this court by appeal.

JACKSON, HURST & STAFFORD, for appellant; HENRY T. KENT, of counsel.

SEARLE & MARSHALL, for appellee.

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MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

It is assigned for error that the court erred in sustaining the demurrer to the first and second special pleas, and in sustaining the objection of appellee to admitting in evidence on behalf of appellant the release from further damages which is set forth in the special pleas, and the section of the constitution of appellant which is set forth in the third special plea. These pleas are pleas of payment and release. The rule is that it is not necessary to plead specially any defense that may be properly offered under the general issue. Payment and a release may be offered in evidence under the general issue. *Kassing v. International Bank*, 74 Ill. 16; *Chicago W. & V. Coal Co. v. Peterson*, 45 Ill. App. 507; 18 Encyc. Pl. & Pr. 88. The general issue was filed in this case, so that the release itself was admissible in evidence without a special plea, if it was competent and material evidence. It is not error to sustain a demurrer to a special plea which does not set up some matter which is not available under the general issue.

The third special plea also set forth a part of the constitution of appellant. The plea does not aver the legal effect of the section of the constitution and does not aver any logical conclusion or effect between the constitution and the release, and hence that part of the plea referring to the constitution is incomplete and insensible. We express no opinion about the meaning or effect of this section had it been properly pleaded. The third special plea cannot be considered as anything more than a plea of satisfaction based on the release alone. There was no error in sustaining the demurrer to the pleas.

Where a corporation bases its defense upon its charter or by-laws the same must be properly pleaded. 5 Encyc. Pl. & Pr. 94. There was no plea based on the section of the constitution offered in evidence, and

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therefore the objection thereto might have been properly sustained because there was no foundation for its introduction in the pleading unless there was some other reason why the objection should have been overruled. The record shows that the appellee offered certain pages of appellant's constitution and by-laws in force July 1, 1901, and that it was stipulated that "either side may introduce in evidence such parts of such book as they may desire, without further proof in regard to the authenticity of the book and contents." This stipulation apparently waives all objections to the section of the constitution and by-laws in the book offered by appellee, and would permit anything in the book material to the case to be offered in evidence without respect to the pleading. The offer by appellant however is of the constitution and by-laws in effect July 1, 1902, to July 1903, which is a date subsequent to that of the book offered by appellee and subsequent to the contract for indemnity and benefits issued to the deceased. The objection to the section of the constitution from a book other than that the stipulation concerned was properly sustained as there was no foundation for it in the pleading.

The release was executed July 19, 1904, by the insured, Harry W. Coulter, now deceased, and recites that it is in consideration of seventy-five dollars to him paid by appellant and purports to release and discharge appellant from liability for or on account of accidental injuries received by him on June 1, 1904. At the time of the execution of the release Harry W. Coulter was the only party who had any vested interest in the indemnity or benefits. Minnie G. Coulter, the beneficiary in case of his death, had no vested interest in the certificate at that time. The declaration alleges that the appellant is a fraternal beneficiary association. The interest of a beneficiary in a certificate is a mere expectancy which becomes vested only on the death of the assured. *Middeke v. Balder*, 198 Ill. 601; *Martin*

v. Stubbins, 126 Ill. 404; Voigt v. Kusten, 164 Ill. 320; Grand Legion S. K. v. Beaty, 224 Ill. 349. This certificate has a dual nature under the by-laws in providing for indemnity to the member for accidents during his lifetime and death benefits to the beneficiary named in the certificate after the death of the member caused by accident. As the pleadings were at the time of trial no reason appears why a payment of indemnity to the member in his lifetime of what was then due him and over which there was no dispute would be any consideration for the release of death benefits to the beneficiary after the death of the member, and the objection was properly sustained to the introduction of the release.

The rules of appellant printed on the back of the certificate of membership provided that appellant is not liable for death or disability when caused wholly or in part by any bodily or mental infirmity or disease. The proof shows that the deceased claimed to have been injured June 1, 1904, at Wapello, Iowa; that he arrived at his home in Rock Island June 6, suffering from a bruise on his back, and went to bed and was confined to his bed until the 13th of June and from that date he was able to be around walking with a cane. On July 7th he appeared to be so far recovered that he went to work in a mattress factory where he worked until July 16th, when he went home sick and took to his bed where he died on August 24, 1904. The contention of appellee is that deceased died from injuries received June 1, while the contention of appellant is that the deceased died wholly or in part from some bodily disease which it is claimed was typhoid fever. A large amount of testimony was presented by both sides tending to support their respective contentions. It is insisted that the court erred in excluding proper testimony offered by appellant on that issue. Appellee offered in evidence certain proofs of death for the purpose of showing that the rule of the appellant requiring notice and proofs of death to be furnished on blanks furnished by appel-

lant had been complied with. These proofs were admitted, the court stating in his ruling that they were admitted "for that purpose only as tending to prove notice to the defendant of the alleged injury and death of the insured." Among the proofs of death are certain questions and answers thereto made by J. E. Assay, M. D., one of the attending physicians of the deceased. The seventh question and answer is: "How long in your opinion, will the claimant be totally disabled?" "Patient died August 24, 1904, in my opinion of injury to spine and typhoid fever." Question ten and answer thereto from another of the proofs of death is: "Was the deceased to your knowledge afflicted with any affection or disease, acute or chronic, at the time? If so to what extent did it contribute to his death? Answer. Yes, by causing injury to sympathetic nervous system and paretic condition of bowels." The appellee made an affidavit that she is the beneficiary, and setting forth among other things that she had read (or heard read) the foregoing statements and affidavits and each and every one thereof and knows the contents; that they are true of her own knowledge. Appellant offered in evidence said question seven and the answer and said question ten and the answer, in connection with the affidavit of the appellee stating she had read the proofs of death and that they were true. The court admitted the affidavit of the appellee, but sustained an objection to the admission of the questions and answers of the physician on the ground that the party had no right to select out and offer a part of the proofs. The appellee offered to admit the papers as an entirety. Appellant did not accept the offer, but insists on its right to the parts it offered. We are of the opinion that the appellee having made an affidavit that the answers of the physician were true, thereby made such questions and answers material and competent evidence against her. They were, in connection with her affidavit, in the nature of an admission against her interest, but

not conclusive. 7 Encyc. of Ev. 576; Commercial Ins. Co. v. Huckberger, 52 Ill. 464; Supreme Tent of K. of M. v. Stensland, 206 Ill. 124. We conclude that appellant was only required to offer so much of the document as it considered material and pertinent as a declaration by appellee against her interest, subject to the right of appellee to read in evidence such other parts of the document as qualify or modify such admission or declaration by appellee against her interest. 9 Encyc. of Ev. 176; Slingloff v. Bruner, 174 Ill. 561; Heinsen v. Lamb, 117 Ill. 549; Imperial Hotel Co. v. H. B. Claffin Co., 55 Ill. App. 337. The evidence upon the question of what was the cause of the death of the assured was very conflicting and had the evidence to which objection was improperly sustained been admitted the verdict might have been different.

Appellant offered in evidence the affidavit of the deceased made June 22, for the purpose of securing indemnity for the three weeks from June 1 to June 22, that he was disabled from attending to his business, in connection with the draft for \$75 and the release. Appellant did not offer this for the purpose of showing or inferring therefrom an admission that Harry W. Coulter had recovered from the injury, but stated that it was offered "for the purpose of proving that Harry W. Coulter during his lifetime made application to defendant for three weeks' indemnity at the rate of \$25 per week, and stated in said application that when said claim was paid it should be in full satisfaction of all claims which he had or might have against defendant on account of injury, and that the injury for which said claim was made is the identical injury alleged in plaintiff's declaration." We hold that it was not proper evidence for that purpose, for the reason that it does not appear but that he had a claim for indemnity and plaintiff also had a claim for death benefits. The purpose of the offer having been thus limited, we hold the objection thereto was properly sustained.

Appellant assigns error on the giving of appellee's

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fourth instruction. The instruction is that though the jury believe from the evidence that the death of Coulter was caused in part by bodily infirmity or disease; yet if you believe from the evidence that said Coulter received accidental injuries and that such bodily infirmity or disease was caused by or was a natural, direct, proximate and necessary result of such accidental injuries and that such accidental injuries were the direct cause of his death, then the fact that such bodily infirmities or disease contributed to cause the death of the deceased would not constitute a defense to this action. This instruction is in accordance with the rule announced in *Central Accident Ins. Co. v. Rembe*, 220 Ill. 151; and *U. S. Health & Accident Ins. Co. v. Harvey*, 129 Ill. App. 104.

The appellant introduced in evidence sections 2 and 3 of Article IX of the constitution in force July 1, 1903. These were admitted in evidence apparently under the stipulation referred to, although the stipulation was concerning a constitution of an earlier date. Section 2 provides that "Five thousand dollars shall be paid to the beneficiaries named in the certificate of a deceased member in case of death by accident." Section 3 provides that "whenever a member of this association shall through external accidental means receive bodily injuries * * * he shall be paid for loss of time occasioned thereby the sum of \$25 per week * * * but such sum shall not be paid in addition to benefits received from section 2 of this article." The court at the request of appellee instructed the jury that the clause, "But such sum shall not be paid in addition to benefits received under section 2 of this Article of appellant's constitution, is of no significance in this case, and the jury will not consider the same." Even applying the rule that policies of insurance are construed most strongly against the insurer, and if susceptible of two constructions that most favorable to the insured will be adopted, the appellant would not be liable to the assured for the indemnity and to the beneficiary for

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the full benefits. The total liability is \$5000. That instruction was erroneous in the form it was given; that error was however attempted to be corrected by the *remittitur*. We do not find any error in the refusal of instructions asked by appellant, for the reason that all proper instructions were contained in those given.

For the error in sustaining objections to proper evidence the judgment is reversed and the cause remanded.

Reversed and remanded.

John Doane, Appellant, v. Joseph Pierce, Appellee.

Gen. No. 4,981.

VERDICT—*when set aside as against the evidence.* A verdict manifestly against the weight of the evidence will be set aside on review.

Assumpsit. Appeal from the Circuit Court of DeKalb county; the Hon. LINUS C. RUTH, Judge, presiding. Heard in this court at the April term, 1908. Reversed and remanded. Opinion filed August 10, 1908. Rehearing denied October 9, 1908.

JONES & ROGERS and J. E. MATTESON, for appellant.

FAISSLER & COCHRAN, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

This was an action in assumpsit brought by John Doane, appellant, against Joseph Pierce, appellee, to recover for 1060 bushels and 20 pounds of oats at thirty-nine and one-half cents per bushel. A jury returned a verdict for the defendant. A motion for a new trial was overruled and plaintiff appeals to this court.

The record shows that John Doane owns a farm near the village of Malta, in DeKalb county, Illinois. This

farm had been occupied for many years by George Doane, a son of plaintiff, as a tenant of his father. The farm was rented on shares, the father getting as rent one-half of the crops raised or one-half of the proceeds of the sale of crops. Pierce is a grain dealer at Malta, having bought grain there for eighteen years, and knows the Doane farm. In the year 1906 when the oats were thrashed in August, John Doane was not willing to sell his share at the price oats were then selling at. George Doane desired to sell his share at that time. His half of the oats were hauled direct from the threshing machine to the market and sold to appellee, who paid George Doane at that time for his grain. Appellant's share of the oats were hauled from the machine to a corn crib on the farm and there stored for him.

In January appellee claims that George Doane talked to him about selling him some grain, and borrowed \$250 from him, but appellee does not claim that any grain was sold to him at that time. In April, 1907, appellant saw appellee at his elevator and inquired of him the price of oats. Appellee told him they were worth thirty-nine and one-half cents. Appellant asked how long he could have to deliver the oats and appellee said a week or so; appellant thereupon said all right he could have the oats. Within a week after this conversation the half of the oats that had been stored in the crib for appellant were delivered to appellee at his elevator, by Gus Carlson, a hired man of George Doane, and by Francis Doane, a son of George Doane. Carlson and Francis Doane both testify they told appellee when delivering the oats that they were the oats of appellant. This the appellee denies. Thereafter appellant went to appellee to get his pay for the oats. Appellee told appellant that his son George owed him some money, and that he wanted to take it out of the pay for the oats, but appellant refused to let him and appellee would not pay. The appellant, his son George, George's hired man, Carlson, and Francis Doane, the

son of George, all testify the oats belonged to appellant and had been set off to him. No person testifies that they did not belong to appellant, neither was there any testimony denying the fact that the oats had been divided and set off to appellant as his share when they were thrashed. There is no question that the value of the oats at the agreed prices was \$419.09; even appellee does not claim but that appellant is entitled to \$168.91. The only witness that testified that George Doane claimed any interest in the oats was one Crosby, and his testimony is that some time after the oats in question had been sold and delivered, in a conversation between George Doane and appellant, George said "they were his oats and he should stay by Pierce," and that appellant there claimed that he owned everything and that the oats were his. This evidence was offered as evidence in chief in behalf of appellee to show that the oats belonged to George. This evidence was improper for that purpose, as the appellant there claimed that he owned them, and George's statement could not prejudice his claim. It might have been proper in impeachment of George Doane, if the proper foundation had been laid, but that not having been done it was not proper for any purpose. The clear preponderance of the evidence is that the oats belonged to appellant and were sold by him to appellee. The verdict should have been set aside as manifestly against the weight of the evidence, and for the error in refusing to do so the judgment must be reversed and the cause remanded for a new trial.

Reversed and remanded.

Jennie Kilmer, Appellant, v. Alonzo Parrish, Appellee.
Gen. No. 5,010.

1. **AMENDMENTS AND JEOPAILS**—*how ruling denying leave to amend must be preserved.* The action of the court in denying leave to amend can only be preserved by bill of exceptions.

2. **AMENDMENTS AND JEOPAILS**—*when abuse of discretion to deny leave.* The court should be liberal in permitting amendments in the interests of justice. After an attachment in aid has been levied, an affidavit may be filed setting up additional grounds for the attachment, even after the trial has begun upon the plea traversing the original affidavit.

3. **AMENDMENTS AND JEOPAILS**—*what essential to order of amendment entered after judgment term.* After a case has been disposed of and the term adjourned, the court can only correct clerical mistakes of its officers, upon notice to the parties, so as to make the record conform to the judgment of the court as shown by the memoranda of the court without the aid of affidavits.

4. **APPEALS AND ERRORS**—*what sufficient prayer for appeal to entitle review of final judgment upon attachment and upon merits.* Where a judgment upon the attachment issue and upon the merits follow each other in the record in immediate succession, an appeal from the "judgment" of the court is sufficient to raise for review the propriety of both judgments.

5. **DAMAGES**—*when new trial may be awarded for inadequacy.* At common law new trials were not allowed upon the ground that the damages allowed by the jury in actions for torts were insufficient, but the modern rule is that a new trial may be granted where the verdict is grossly inadequate, for the same reasons as those governing where the verdict is excessive.

Trespass. Appeal from the Circuit Court of LaSalle county; the Hon. EDGAR ELDRIDGE, Judge, presiding. Heard in this court at the April term, 1908. Reversed and remanded. Opinion filed August 10, 1908. Rehearing denied October 9, 1908.

Statement by the Court. This is an action in trespass brought by Jennie Kilmer, appellant, against Alonzo Parrish, appellee, on August 29, 1906, to recover for personal injuries received August 16, 1906, for money paid out for doctor's bill and in repairing her carriage and for damages to her team. The decla-

ration alleges that the defendant, while intoxicated, drove his carriage with great force against the carriage of plaintiff and inflicted the injuries complained of and that the injury was caused by the negligent, wilful and reckless conduct of the defendant.

After the beginning of this suit, the defendant went to Kansas and claims to have purchased land there; he then advertised his farm for sale at auction for November 20th, and also arranged for the sale of his personal property. In November, the plaintiff filed an affidavit that the defendant was about to fraudulently conceal and dispose of his property so as to hinder or delay his creditors; a writ of attachment was issued in aid of her suit and levied on 100 acres of the farm advertised for sale. The farm was not sold at the time fixed in the advertisement, but on November 25th the defendant mortgaged it for \$8,000 and again on January 29, 1907, for \$15,000 and on January 17, 1908, he sold it.

In February, 1907, he had a public sale of his personal property, and all that was not sold he afterwards took to Kansas, where he has since resided.

The defendant filed the general issue at the June term, 1907, and on December 20th, at the October term, 1907, filed a plea denying the ground of the attachment. At the January term, 1908, the plaintiff moved for leave to file an amended affidavit alleging additional causes for the attachment. This motion the court overruled but no bill of exception was filed saving this question. Thereafter on a trial before a jury a verdict was rendered by the direction of the court for the defendant on the attachment; on the main issue the jury returned a verdict in favor of the plaintiff, and assessed her damages at one dollar. The plaintiff made a motion for a new trial, which was overruled and judgment rendered on the verdict in favor of the defendant on the attachment, and in favor of the plaintiff on the main issue; from that judgment the plaintiff prosecutes this appeal.

BROWNE & WILEY and LESTER H. STRAWN, for appellant.

BUTTERS, ARMSTRONG & FERGUSON, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

It is contended by the plaintiff that the court erred in overruling the motion for leave to amend the attachment in aid made before the trial. The ruling of the court upon that motion can only be presented by a bill of exceptions setting forth the affidavit, the ruling and an exception thereto. Motions and affidavits are not a part of a proper common law record: it is not sufficient that the clerk copy them into the transcript but they must be preserved with an exception to the ruling by a bill of exceptions. *McFarland v. Claypool*, 128 Ill. 397; 8 Ill. Cyc. Dig. 364.

On the trial at the close of plaintiff's evidence the defendant moved to exclude the evidence in support of the attachment in aid. The plaintiff again moved for leave to amend by adding new grounds for the attachment. This motion was overruled, and is contained in the bill of exceptions, with an exception to the ruling. The court should be liberal in permitting amendments in the interests of justice; after an attachment in aid has been levied, an affidavit may be filed setting up additional grounds for the attachment, even after the trial has begun upon the plea traversing the original affidavit. *Keith v. Ray*, 231 Ill. 213; *Bailey v. Valley National Bank*, 127 Ill. 332. We are of the opinion that under the facts proven in this case the court should have permitted the amendment.

In writing up the judgment, the clerk wrote up the judgment for the defendant upon the attachment in one sentence, and the judgment for the plaintiff on the merits in the next sentence. This is followed by the sentence "thereupon the plaintiff having entered her exceptions herein prays an appeal from the judgment of this court to the Appellate Court in and for the

Second District of the state of Illinois, which said appeal is granted." At the succeeding term of the court plaintiff moved to amend the judgment by changing "appeal from the judgment of this court" to "appeal from the judgments of this court," and filed an affidavit in support of the motion and produced the original minutes of the judge. This motion the court allowed. The defendant took a bill of exceptions from that order, and has moved this court to strike out the amendment in the record, wherein the word "judgments" was substituted "judgment." After the case was disposed of and the term adjourned the court could only correct clerical mistakes of its officers upon notice to the parties so as to make the record conform to the judgment of the court as shown by the memoranda of the court, without the aid of affidavits. *Coughran v. Guchaus*, 18 Ill. 390; *Gage v. The People*, 207 Ill. 377; 1 Black on Judg. 154. The two judgments follow each other in immediate succession and the plaintiff prays an appeal from the judgment. We think the prayer for an appeal raises every question that can properly be raised upon the record and the bill of exceptions. The bill of exceptions properly filed shows an exception to the ruling of the court on the plaintiff's motion for a new trial, and to the judgment both upon the attachment and upon the merits. The plaintiff in appealing appealed from the entire judgment, treating it as a unit. The amendment is immaterial, and it is unnecessary to determine whether the amended record should be stricken out or not.

The evidence shows that the defendant was in Ottawa on the afternoon of the day the defendant received the injuries complained of; that he left Ottawa for his farm eleven miles from Ottawa, where he arrived that night so intoxicated that in driving from the highway through his gate he drove against the gate-post, smashing his road wagon and injuring himself; that the plaintiff was injured about eight o'clock that evening. Wit-

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nesses testify that the defendant drove his team at a reckless speed on the streets of Ottawa and against the buggy of the plaintiff. The plaintiff was injured, it may be not as seriously as she contends. Her carriage was damaged and it required several dollars to repair it. The physicians bill for treating her injuries amounts to \$88.50. The defense of the appellee is an alibi. He claims that he left Ottawa an hour or two before the accident occurred.

The jury in finding for the plaintiff in the sum of one dollar, found that defendant was guilty of inflicting the injuries sued for. If the plaintiff was entitled to recover she was entitled to substantial damages. The damages allowed should be equal to the pecuniary loss sustained. There is a fixed measure of damages for the value of physician's services and for the amount of damages to a carriage and team, of which proof was made. At common law new trials were not allowed upon the ground that the damages allowed by the jury in actions for torts were insufficient. But the modern rule is that a new trial may be granted where the verdict is grossly inadequate, for the same reasons as those governing where the verdict is excessive. *Paul v. Leyenberger*, 17 Ill. App. 167; *Hackett v. Pratt*, 52 Ill. App. 346; *Hamilton v. Pittsburg, C., C. & St. L. Ry.*, 104 Ill. App. 207; *Bourke v. Anglo-American Provision Co.*, 90 Ill. App. 225; 14 *Encyc. of Pl. & Pr.* 764, and cases cited. A verdict for a grossly inadequate amount stands on no higher ground on legal principles than a verdict for an excessive or extravagant amount. The defendant is either liable or he is not liable. The jury having found he was guilty of the wrongs alleged, we can conceive of no theory upon which the verdict for one dollar can be sustained. The motion for a new trial should have been allowed, and the verdict set aside because of its absurdity. The judgment both on the attachment and on the merits is reversed and the cause remanded.

Reversed and remanded.

The People of the State of Illinois, Appellee, v. E. B. Trenner, Appellant.

Gen. No. 5,033.

1. *EVIDENCE—what not competent in behalf of person charged with practicing medicine without license.* In an action of debt to recover a penalty for practicing medicine without a license a pamphlet in nowise supported by the testimony of the defendant or other witnesses, showing the treatment employed by such defendant, is not competent in his behalf.

2. *CRIMINAL LAW—what practicing medicine without license within meaning of statute.* One who without a license professes and undertakes to heal by the laying on of hands, together with mental suggestion, comes within the provision of the law requiring a license to practice medicine.

Action of debt. Appeal from the Circuit Court of Livingston county; the Hon. GEORGE W. PATTON, Judge, presiding. Heard in this court at the April term, 1908. Affirmed. Opinion filed August 10, 1908. Rehearing denied October 9, 1908.

A. C. NORTON, for appellant.

A. C. BALL, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

This is an action of debt by the People, for the use of the State Board of Health, against E. B. Trenner, appellant, to recover a penalty for practicing medicine without a license, contrary to the provisions of the act of 1899 regulating the practice of medicine in this state. The record does not contain any process or return of service. The declaration contains twenty-five counts alleging that the defendant at different times within eighteen months had practiced medicine and surgery in the county of Livingston on various parties without a certificate issued by the Illinois State Board of Health. The defendant appeared and filed a plea of the general issue and also a plea of the eighteen months Statute of Limitation. Upon a trial before a

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jury the issues were found for the plaintiff on the 7th and 15th counts, and plaintiff's damages assessed at \$100 on each count. A motion for a new trial was overruled and judgment entered on the verdict. From that judgment the defendant appeals to this court.

The error that is relied upon and most strenuously argued is that the evidence does not support the verdict. A number of witnesses testified that the appellant at different times within eighteen months prior to the beginning of the suit had treated them for various diseases and ailments. The proof clearly showed that he had treated parties for nervous prostration, diseases of the throat, kidney trouble, headache, growth of bone on the heel, dislocated hip and many other physical ailments; that in his treatment of a number of the parties, they were disrobed, and the defendant rubbed and manipulated their bodies with his hands, some of the witnesses saying that he treated them the same as an osteopath treats diseases. The rubbing and manipulating in some instances occupied from twenty to thirty minutes or longer, and some of the parties were so treated as many as twenty times.

The proof also shows that the defendant advertised in the public prints that "Prof. Trenner, magnetic-healer and osteopath, has had a fine location in business already established in a large town offered him recently, but after considering the matter decided he liked Pontiac so well that he would remain. It is hoped that the people will appreciate his ability," etc. This advertisement was headed by a picture of the defendant and is entitled "A Wonderful Success." It was admitted that the defendant never had any license from the State Board of Health to practice medicine.

The defendant did not take the witness stand or offer any proof denying the proof made by plaintiff. The defendant did offer in evidence a pamphlet purporting to be signed by S. A. Weltmer, professing to be an exposition of the Weltmer method of healing; this the court admitted in evidence over the objection of the

People. This was offered as the evidence the defendant would testify was the treatment given by him if he had been sworn as a witness. This was clearly improper; it was admitting in evidence a printed statement published by an irresponsible and unknown person as the statement of the defendant on his own behalf, without any opportunity to the opposite party to cross examine. We quote the following excerpts from the pamphlet.

“The process of physical healing, by suggestion, laying on of hands, or any other physical manipulation, causing mental action which will result in physical change, is a simple, easily taught science. This has often been demonstrated in the author’s experience * * * : Suggestion is identified with everything that the healer does. However, there are other helps which the healer uses in effecting cures. These are important, and should not be overlooked * * *: * * * If the man is suffering from a severe pain, do not the moment he sits down tell him he is easy. He knows better than that, and you will only arouse an antagonism in his mind, which you will have to overcome, before you can succeed with him. Tell him he will be better, and then by stroking with your hands or by placing them over the parts affected, showing him you are doing something for his benefit, and continue to assert that he will become easy. * * * One of the chief aids to suggestion used by the drugless healer is what is known as ‘Animal Magnetism,’ ‘Animal Electricity,’ ‘Odic Force,’ ‘Electro Biological Force,’ or as we call it ‘Vital Magnetism.’ This name is intended to be suggestive than otherwise. * * * Some authors claim that water charged with this ‘fluid’ will remain sweet long after water not so treated will become stagnant. I have often seen the experiment tried, and successfully too, of magnetizing one of two glasses of water, just alike in appearance, giving them to a sensitive person to see if he can tell the difference between them. He almost invariably does. This may be the result of suggestion, it may not; but whatever it is, it is a great aid to the healer when prop-

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erly used. It is often very helpful for a healer to magnetize a bottle of water which the patient takes home with him after his treatment and drinks at stated intervals, with the understanding that certain beneficial effects will follow."

If the defendant practiced mental suggestion only and strictly according to the Weltmer method, still this pamphlet states "It is often very helpful for the healer to magnetize a bottle of water which the patient takes home with him and drinks at stated intervals with the understanding that certain beneficial effects will follow," and suggests the use of "Animal Magnetism" and "Electro Biological Force" through the laying on of hands over the affected part.

misprint
It is very questionable whether these practices do not come within the statute which was enacted for the protection of the citizens of the state from such practitioners. However the defendant in no way denied the proof of manipulation that was made on behalf of plaintiff. The case of the People v. Gordon, 195 Ill. 560, lays down the rule, that one who advertises himself as a magnetic healer and who gives treatments by rubbing or kneading the body for the purpose of freeing the nerve force, in the nature of osteopathic treatment, is not within the exception in favor of those treating the sick by mental or spiritual means, even though he accompanied his treatment by mental suggestion, but is practicing medicine within the meaning of the statute and liable to the penalty. It is unnecessary for us to say anything more on the merits of this case as the case cited decides the question argued by appellant against him.

The instructions were much more favorable to the defendant than he was entitled to. Under the proof the defendant should also have been found guilty on several of the other counts. There is no error of which he can complain. The judgment is affirmed.

Affirmed.

**D. Heenan Mercantile Company, Appellee, v. William
J. Welter, Appellant.**

Gen. No. 5,042.

1. **JUSTICE OF THE PEACE**—*when demands may be set off.* Under the statute all demands within the limit of the justice's jurisdiction should be brought in by the parties for determination and the defendant is entitled to interpose by way of set-off a debt accruing to him either under an implied or an express contract.

2. **SET-OFF**—*what proper subject of.* Demands for work and labor performed, board, goods sold and delivered, are of such a nature that they may be set-off in an action *ex contractu*, whether they arise out of the subject-matter of the plaintiff's suit or not.

Action commenced before justice of the peace. Appeal from the Circuit Court of LaSalle county; the Hon EDGAR ELDRIDGE, Judge, presiding. Heard in this court at the April term, 1908. Reversed and remanded. Opinion filed August 10, 1908. Rehearing denied October 9, 1908.

CHUBBUCK & JONES, for appellants.

REEVES, OSBORN & GRIGGS, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

This is an appeal by the defendant from a judgment for \$168.31 entered upon a directed verdict for the plaintiff in an action originally brought before a justice of the peace. The evidence shows that the appellee is a mercantile corporation and that it brought this suit to recover a balance claimed to be due for goods sold by it to appellant. The appellee filed a statement of the account between the parties, the first item of which is "Feb. 1, 1900, suit \$12.00." This is followed by several pages of items charged at various times from February 1, 1900, to January 30, 1907, the total of which amounts to \$750.93. Appellee's account also gave the appellant credit for various items of which the following is a copy:

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"May 1, 1900, to July 1, 1900, salary..	\$ 69.00	
July 7, 1900, to Jan. 1, 1901, salary..	102.00	
Jan. 1, 1901, to Jan. 1, 1902, salary.....	221.00	
Mar. Shirts returned,.....	4.00	
1906		
Jan. 1, 1902, to Sept. 27, 1902, 38½ wks.	162.86	
June 19, Due bill.....	1.38	
Nov. 20, Cash.....	19.24	
29, Due bill.....	2.14	
1907		
Jan. 30, Ramper.....	.50	
30, Cash.....	.50	582.62"

The difference between the two totals is \$168.31, for which sum the court directed a verdict, and rendered judgment.

The statements of counsel contained in the bill of exceptions and the evidence offered by appellant show that the appellant was a salesman in the shoe department of appellee's store at Streator for ten years prior to September, 1902. He received a salary of \$1000 per year or \$19.23 per week. During part of the time he drew \$12 cash weekly, and the balance was credited to his account. The appellee claims that in November, 1900, Heenan, the president of appellee, called appellant into the office and informed him that the manager of the shoe department was about to leave and that they had considered appellant in connection with that position, and assured him there would be additional pay for the added responsibility. No additional compensation was agreed upon, Heenan saying it was necessary to talk it over with Miles Finlen, his associate. Appellant insists that Heenan there told him to go ahead and assume the responsibility of the department and they would pay him what it was worth. Appellant claims he had several conversations with Heenan regarding the salary he was to receive as manager, but Heenan put him off by saying he had not seen Finlen, and assured him he need not worry, that they would pay him what it was worth. At one of these conversations appellant suggested \$3.50 a week additional

would be reasonable compensation for his extra services as buyer and manager, and that Heenan said "All right, I will see Finlen about it." Matters ran in this way until September, 1902, when appellant told Heenan the salary question must be settled. Heenan then told appellant they would not pay him any additional salary. The appellant then tendered his resignation, but remained in the store two weeks at Heenan's request. Heenan then offered appellant \$1,500 per year if he would stay with appellee. Appellee claims that during the last two years appellant drew \$15 per week and the balance of his salary was credited to his store account, while appellant filed a set-off and contends that the credits given him were erroneous and that he was entitled to a credit of an additional \$3.50 per week, for the time he acted as buyer and manager.

The trial court refused to permit appellant to make proof of the alleged agreement that he should be paid what his services were worth for the extra services rendered by appellant, additional to the \$19.23 per week, and the value of such additional services. The ruling of the court was based on the theory that the accounts were not mutual and that the claim for additional compensation to appellant was not liquidated and therefore not the subject of set-off.

Under the statute, when suit is begun before a justice, "each party shall bring forward all his demands against the other, existing at the commencement of the action, which are of such a nature as to be consolidated, which do not exceed two hundred dollars when consolidated into one action or defense; and on refusing or neglecting to do so shall forever be barred from suing therefor." Hurd's Stat. chap. 79. sec. 53. Appellee credited appellant, in its statements of the account, with the following items; "Jan. 1, 1901, to Jan. 1, 1902, salary, \$221.00; 1906, Jan. 1, 1902, to Sept. 27, 1902, 38½ wks. \$162.86," being the balance of salary during the time appellant insists he is entitled to an additional credit. Appellant claims those credits are

not what he is entitled to under the conversation he had with Heenan, when Heenan promoted appellant to be buyer and manager of the shoe department. Appellant also undertook to prove that it was the agreement, that his earnings over the amount he drew weekly, should be applied to his store account with appellee. We can see no legal reason why appellant should be bound by the credits given him by appellee, if they were not as much as he was entitled to under an implied contract. The suit having been begun before a justice, each party was required to bring forward all his demands existing against the other which are of such a nature as to be consolidated, if the balance does not exceed two hundred dollars, or be barred from thereafter suing therefor. This applies as well to implied as to express contracts. The balance, if any, due appellee depended upon whether the items of credit it had given appellant were for the correct amounts. To hold otherwise would be to hold that the books of appellee are conclusive, and that the items therein are not open to contradiction, even although it appears from them that the credit for thirty-eight and one half weeks services rendered in 1902 was not given until 1906. Demands for work and labor performed, board, goods sold and delivered, are of such a nature that they may be set off in an action *ex contractu*, whether they arise out of the subject-matter of the plaintiff's suit or not. *East v. Crow*, 70 Ill. 91; *Lloyd & Co. v. Manufacturers & Merchants Warehouse Co.*, 102 Ill. App. 551; *Kelley, Maus & Co. v. Caffrey*, 79 Ill. App. 279. We hold that the set-off for services claimed by the appellee leaving a balance of less than \$200, whichever contention prevails, is that character of a claim or demand that the justice act requires shall be presented or it will be barred, and that the court erred in the rejection of the evidence offered. The judgment is therefore reversed and the cause remanded.

Reversed and remanded.

The People of the State of Illinois, Defendant in Error, v. Andrew A. Strauch et al., Plaintiffs in Error.

Gen. No. 4,958.

1. **VERDICT**—*what essential to set aside, because of prejudice of juror.* The testimony as to previously expressed opinions by persons called as jurors should be of a clear and satisfactory character in order to warrant setting aside a verdict.

2. **CONSPIRACY**—*what proof of, sufficient.* Conspiracy is necessarily proved by circumstances and when the circumstances proven are such that no other reasonable conclusion can be drawn from the evidence but that the defendants are beyond a reasonable doubt guilty as charged, the conspiracy is proven.

Criminal prosecution for conspiracy. Error to the Circuit Court of Carroll County; the Hon. OSCAR E. HEARD, Judge, presiding. Heard in this court at the April term, 1908. Affirmed. Opinion filed October 14, 1908.

W. H. A. RENNER and ORION M. GROVE, for plaintiffs in error; E. E. WINGERT, of counsel.

FRANKLIN J. STRANSKY, for defendant in error.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

Andrew A. Strauch and Oswald Strauch, plaintiffs in error, were indicted with Herbert E. Hughes in the Circuit Court of Carroll county, on a charge of conspiracy to prevent competition in the letting of contracts to build certain bridges in the town of Fair Haven, in Carroll county, which were advertised to be let on June 30, 1906. Hughes entered a plea of guilty and was fined \$500. On a trial plaintiffs in error were found guilty and a fine of \$500 assessed against Andrew A. Strauch and a fine of \$300 against Oswald Strauch. Judgment was entered on the verdict and an order made that each defendant stand committed until the payment of their respective fines and the costs.

The People v. Strauch, 144 App. 283.

To reverse that judgment this writ of error is sued out.

It is assigned for error that one of the jurors was prejudiced against Andrew A. Strauch and that the plaintiffs in error were not tried by an unprejudiced jury. The court heard the evidence of two witnesses, W. J. Lamereaux and Frank Roberts, on the motion for a new trial, as to two alleged statements of John Her, one of the jurors, which if made would show he was prejudiced. The juror denied having made any such statements. Evidence was also offered showing that the reputation of Frank Roberts for truth and veracity was bad. Lamereaux admitted he was a strong partisan of Strauch, and a number of witnesses who were present at the time and place of the conversation testified to by W. J. Lamereaux, say that they heard no such statement made by Her. The testimony as to previously expressed opinions by persons called as jurors should be of a clear and satisfactory character in order to warrant setting aside a verdict. *Hughes v. People*, 116 Ill. 330; *Davison v. People*, 90 Ill. 221. The court, under the showing made, properly refused to grant a new trial upon the ground of prejudice of the juror.

The question most strenuously argued is that the evidence does not support the conviction of Andrew A. Strauch. The evidence shows that Andrew A. Strauch is and was for a number of years a supervisor of the town of Fair Haven, the keeper of a store and the editor and proprietor of a newspaper called the Chadwick Clarion. Oswald Strauch is a son of Andrew A. Strauch, twenty-eight years of age, and up to some time in June, 1906, was a student in the civil engineering department of the State University at Champaign. The commissioners of highways of the town of Fair Haven had made application for county aid in building two iron bridges in June, 1905. That application was denied. It was renewed in June, 1906. The petitions for county aid in June, 1906, were delivered by the com-

missioners of highways to Andrew A. Strauch, who presented them to the chairman of the county board and made a request that certain supervisors be named as the committee of the board to act on the petitions. The county board agreed to assist in building the two bridges. The time for letting the contracts was advertised for June 30, 1906. The letting of contracts for building some smaller concrete bridges was also advertised for the same day. Andrew A. Strauch, prior to June 30, went to Chicago and to Minneapolis, Minnesota, to see bridge building companies for the purpose of getting estimates on the bridges. He wrote to Oswald Strauch about these visits to the bridge building companies. The letters were not produced, but Oswald, who testified for the defendants, said his father wrote that he went for the purpose of getting estimates. The only estimate he got was from a Chicago company. This he turned over to his sons, they say for the purpose of aiding them in making a bid on the work. On June 29, the sons say they gave up the idea of bidding on the iron bridges, and on that day Andrew A. Strauch went to Clinton, Iowa, to get estimates on the iron bridges, but without taking with him any plans or specifications. Andrew A. Strauch said to the Clinton Bridge and Iron Company that his visit was in reference to getting prices on steel for bridges, and with a view to purchasing metal in case his sons secured the contract. He told the Clinton Company that, if it would give him prices, it need not attend the letting; that his sons would look after the matter; that his sons were contemplating going into the business, and if they could make satisfactory arrangements to purchase metal they would be glad to buy from the Clinton Company, if the sons secured the contracts. The Clinton Company declined to give any estimates without plans and specifications, and also because it was unwilling to give estimates to any one who might be a competitor. He told the Clinton people that if he could not get estimates from them he would get them

somewhere else. Andrew A. Strauch reported to Oswald the next morning that he could not get anything satisfactory, as the Clinton company was going to be represented at the letting of the contracts. On June 30, Herbert E. Hughes, president of the Continental Bridge Company of Chicago, one of the defendants, and who plead guilty to the indictment, was the only person present to bid on the iron bridges. Andrew A. Strauch introduced his son Oswald to Hughes and told Hughes his sons were intending to bid on this contract and that he would like to have him talk it over with them. Hughes testifies that he and both plaintiffs in error went to Andrew A. Strauch's private office and there Andrew left Hughes and Oswald, saying to them "What ever you do don't get me mixed up in any of your deals; you and Hughes figure it over but don't mix my name in any of your deals." Oswald Strauch testifies that Hughes there showed his figures on the two bridges to him, \$1250 on one and \$1000 on the other, and then Hughes changed the figures to \$1175 and \$900 and that he, Oswald, went into the other room and reported this change to his father; that his father said the figures were too high, and Oswald went back to Hughes and Hughes again changed them to \$1175 and \$860. Andrew A. Strauch, during the forenoon of June 30th, approached Joseph Warner, one of the supervisor's committee having charge of the letting of the contract, and told him there was only one bridge man present to bid, and Warner told him he had never let a contract on one bid. Strauch then told Warner he had a boy who had been figuring with different iron men, and wanted to know if there was any objection to his boy bidding. Warner saw Hughes, Oswald and Andrew A. Strauch together after this conversation. After these occurrences, Hughes raised his figures, putting in a bid on the bridges for his company at \$885 and \$1183 and Oswald Strauch testifies that he put in an accommodation bid \$50 higher than

Hughes because his father wanted the contract let, and Hughes agreed not to bid on the concrete bridges, and agreed that Oswald Strauch might do the hauling for him. The contract for the two iron bridges was let to the company Hughes represented on June 30. Two days later Oswald Strauch visited the office in Chicago of the bridge company that Hughes represented and received a check for \$50 and gave a receipt for \$50 on account of services at Chadwick on June 30.

The foregoing matters shown by the evidence are not controverted. Hughes plead guilty and counsel for Oswald Strauch say in their argument, "It is not contended that plaintiff in error, Oswald Strauch, stands free from censure in this matter. The placing of the accommodation bid is censurable, and would naturally raise a suspicion. The payment of the \$50 together with the receipt adds materially to such suspicion." This amounts to an admission of the guilt of Oswald Strauch. The evidence shows that Andrew Strauch was engaged in attempting to get the contract for his sons, which was inconsistent with his duty as a supervisor. It is also shown that the Clinton Bridge Company intended to be present at the letting of the contract, but when Andrew A. Strauch visited that company the day before the contracts were to be let, and had the peculiar conversation he had in the office of that company, it would hardly be expected that that company would be represented at the letting the contracts. An agreement was obtained by plaintiff in error Oswald Strauch from the Continental Bridge Company the day the contracts were let not to bid against the sons on the concrete bridges. After the making of that agreement the sons secured the contracts for building those bridges. The sons also secured \$50 graft from the Continental Bridge Company besides the withdrawal of that company from competing for the building of the concrete bridges in return for the sons not bidding in good faith on the

iron bridges but putting in a sham bid slightly above the bid of the Continental Company. All the facts and circumstances surrounding the undisputed facts point to the participation of Andrew A. Strauch in the conspiracy. His statement "whatever you do don't get me mixed up in any of your deals," after introducing his son to Hughes, is very suggestive. No explanation is offered of all the many circumstances pointing so unmistakably to the guilt of the plaintiffs in error. Conspiracy is necessarily proved by circumstances, and when the circumstances proven are such that no other reasonable conclusion can be drawn from the evidence but that the defendants are beyond a reasonable doubt guilty as charged, the conspiracy is proven. It is unnecessary to recite the many minor incriminating circumstances and acts of the plaintiffs in error shown by the record. Sufficient of the evidence has been recited to show that the indictment was clearly proven.

Complaint is made concerning the language of the attorneys in stating and arguing the case. When the nature of the case under discussion and the character of the evidence is considered, we do not think the language used is seriously objectionable.

It is assigned for error that the court erred in giving five instructions at the request of the people. We have examined them and do not find that they are incorrect. Plaintiffs in error insist that all the law on any branch of the case must be stated in each instruction. The first instruction given directed the jury to consider all the instructions together as one series, and the twenty-seven instructions given for the plaintiffs in error removed any obscurity there might be in the people's instructions. We find no prejudicial error in the case, and the judgment is affirmed.

Affirmed.

**Mary C. Merrifield, Defendant in Error, v. Western
Cottage Piano & Organ Company et al., Plaintiffs
in Error.**

Gen. No. 4,961.

1. *EXECUTIONS—effect of restraining as to one defendant.* An execution, the enforcement of which is restrained as to one defendant, may be executed as to the remainder, in which case the execution runs against all defendants named in the judgment including the one against whom its enforcement is restrained.

2. *AMENDMENTS AND JEOPAILS—when execution may be amended.* An execution may be amended provided there is that in the judgment by which to amend.

Assumpsit. Error to the Circuit Court of LaSalle county; the Hon. EDGAR ELDREDGE, Judge, presiding. Heard in this court at the April term, 1908. Affirmed. Opinion filed October 14, 1908.

Statement by the Court. On January 18, 1907, the Western Cottage Piano and Organ Company (hereinafter described as the company) executed three notes for \$5000 each, payable four months after date to the order of W. T. Rickards & Co. Each of the notes was indorsed by L. W. Merrifield and T. W. Burrows. On May 24, 1907, a similar note for \$5000 was made with the same indorsers. The four notes were indorsed without recourse to Mary C. Merrifield by W. T. Rickards & Co. Mary C. Merrifield brought suit in assumpsit to the June term of the Circuit Court of LaSalle county on these notes, so indorsed to her, against the maker and also against the indorsers, whom she declared against as guarantors. Summons was duly served ten days prior to said term on all the defendants. On the 21st of June the defendants were defaulted and judgment rendered against all of them for \$20,084.49. On the 29th day of June the defendant, Burrows, made a motion to set aside the default and open up the judgment and for leave to plead. The court on hearing the motion made an order "that execution herein be and the

same is hereby restrained, grants leave to said defendant to plead and orders that the judgment entered herein stand as security for the debt." The defendant Burrows filed a plea of the general issue with notice of special matters intended to be relied on, and filed with his plea and notice, an affidavit that he had a good defense upon the merits and that his defense is particularly set forth in the notice of special matters relied on. On the 22nd of October at the October term, counsel for Burrows gave notice that on the next day they would ask for leave to file an additional plea for Burrows and also ask leave to file a plea for the defendant company, but the record does not show any such motion was ever made on behalf of defendant company. On October 23rd the defendant Burrows moved for leave to withdraw the notice under the general issue and for leave to file special pleas. This motion was granted. Thereupon the defendant Burrows filed three special pleas and the plaintiff filed a replication concluding with a verification. The record does not show that the pleading was closed. On February 8, 1908, an execution was issued on this judgment against the company and L. W. Merrifield to the sheriff of La-Salle county. On February 11, at the January term, the attorneys for T. W. Burrows, professing to act in the name of the company, made a motion to recall and quash the execution, and the plaintiff made a cross motion to set aside the order "entered herein on June 29, 1907, setting aside the default as to the defendant T. W. Burrows, opening up the judgment and granting leave to said defendant to plead." On February 18, the court sustained the motion made by defendant in error, "to vacate order setting aside default as to T. W. Burrows" and "overrules the motion to recall the execution made by the company." The defendant, Burrows, excepted to this order and prayed an appeal therefrom. Thereafter on February 25, the plaintiff moved the court to amend the execution so as to make

it conform to the judgment by inserting the name of T. W. Burrows. This motion the court allowed and ordered that the execution be amended by inserting the name of the defendant Burrows. The defendant Burrows excepted to this order.

This case is in this court by virtue of two writs of error sued out by the plaintiff in error, T. W. Burrows, and which were consolidated in this court on his motion. One of these writs of error is in Gen. No. 4968, sued out to reverse the order of February 18 vacating the order permitting Burrows to plead. The other is in Gen. No. 4961, sued out to reverse the order of February 25, directing the amendment of the execution. We originally filed an opinion covering the entire case as consolidated. Since that opinion was filed plaintiff in error has practically abandoned the consolidation by appealing No. 4961 to the Supreme Court and by petitioning for a rehearing in No. 4968. It therefore becomes necessary to sever the opinion. That part of the opinion which relates to No. 4961 is as follows:

JARVIS R. BURROWS, EDDY, HALEY & WETTEN and BUTTERS, ARMSTRONG & FERGUSON, for plaintiffs in error; P. C. HALEY, of counsel.

McDOUGALL & CHAPMAN, for defendant in error.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

There was no order restraining execution as to any of the defendants except Burrows. The execution was restrained on his motion, and the order did not interfere with proceeding under the execution against the other defendants. An execution must follow the judgment and appear to be against all the defendants, notwithstanding for some cause no levy can be made on the property of some. Freeman on Executions, sec. 42. Where an execution is stayed as to one defendant it

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may be enforced against the others. *Sheetz v. Winkoop*, 74 Penn. St. 198.

Upon the question presented concerning the issuing and amendment of the execution, the following considerations appear to us to control. Burrows could only appear and defend for himself. The other defendants did not claim that this debt had been paid, or that they did not owe it. Although Burrows, who was apparently a mere guarantor on the note, obtained leave to plead, he had no right to prevent plaintiff from collecting the judgment against the other defendants. It was proper to overrule the motion of Burrows to recall the execution as against the other defendants. An execution ought to conform to the judgment, and the execution as originally issued omitted the name of Thomas W. Burrows, a defendant against whom the judgment still stood. There was therefore an informality in the execution. An execution can be amended, provided there is that in the judgment by which to amend. Revised Statutes, Chap. 7, "Amendments and Jeofails"; *Bybee v. Ashby*, 2 Gilm. 151, 166, where common law authorities are cited; *Lewis v. Lindley*, 28 Ill. 147; *Durham v. Heaton*, 28 Ill. 264; *McCormick v. Wheeler*, 36 Ill. 114; *Bissell v. Kip*, 5 Johns. 89, where it was held that the execution could be amended where there was something to amend by, namely, the judgment. We are of opinion that in view of the fact that there were two other defendants who were not claiming a defense nor resisting the collection of the judgment, the original order should have permitted an execution to issue against all the defendants upon the face of the judgment, and should have only stayed the collection of the execution as against Thomas W. Burrows. The order of the January term, 1908, permitting the amendment by inserting the name of Burrows in the execution was practically a modification of the former order, and it is therefore affirmed. The court should, however, upon again repossessing

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itself of the case, enter an order that the execution be not collected as against Thomas W. Burrows till the further order of the court.

The order in No. 4961, allowing the amendment of the execution, is therefore affirmed.

Affirmed.

Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, Appellee, v. City of Chicago, Appellant.

Gen. No. 4,625.

1. **CHANGE OF VENUE**—*propriety of granting, from one county to another.* A petition for a change from one county to another is addressed to the sound discretion of the court; the propriety of the granting or refusing the change should not be determined necessarily with the side presenting the greater number of affidavits.

2. **CHANGE OF VENUE**—*how question of propriety of, saved for review.* Where a change has been granted from one county to another the propriety of the change should be preserved by a motion to remand with an exception, if such motion to remand, is overruled.

3. **PRACTICE**—*what not reached by motion in arrest.* A judgment after verdict can only be arrested for substantial faults. All defects which would not have been fatal on a general demurrer are cured by pleading to the issue, and are aided by verdict. When the pleading states the essential requisites of a cause of action, the court will presume that the particular fact or circumstance which appears to be defectively or imperfectly stated or omitted was proved at the trial. A defective or inaccurate statement of a cause of action is cured by a general verdict but where no cause of action is stated a verdict will not cure the defect.

4. **PLEADING**—*what sufficient allegation of ownership.* After verdict averments that "plaintiff was possessed as of its own property" and "the property of the plaintiff was destroyed or injured," amount to an allegation of ownership by the plaintiff.

5. **PLEADING**—*when venue sufficiently alleged.* In an action under the statute rendering cities, etc. liable for the loss of property from mob violence, the location of the mob which destroyed the property is sufficiently set up by an averment that "within the territorial limits of the city of Chicago, aforesaid, in consequence

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of a certain mob or mobs, riot or riots, each of which was then and there composed of twelve or more persons within the territorial limits of said city of Chicago, a large quantity" etc.

6. CITIES, VILLAGES AND TOWNS—*when notice under statute concerning loss of property through mobs sufficient.* A notice in the language of the statute which renders cities liable for the property of citizens destroyed through mob violence, is sufficient which has attached a schedule describing the property in detail, and whether destroyed or injured, the place of loss, the date of the loss, and the amount of damage to each item of property, and which was served by the solicitor for the party suffering the loss upon the mayor of the city claimed to be liable, by handing to him a true copy thereof within the time fixed by statute.

7. CITIES, VILLAGES AND TOWNS—*what not competent against city.* In an action against a city to recover for property alleged to have been destroyed through mob violence, a dispatch by the mayor of the city to the governor of the state describing conditions and asking for troops, prepared by the legal department of such city, is not a part of the *res gestæ* and is not competent against the city.

8. EVIDENCE—*what not part of res gestæ.* Declarations to be *res gestæ* must be spontaneous and not statements which are deliberate and prepared for a purpose.

9. APPEALS AND ERRORS—*when affirmance is by operation of law.* Where there are but two justices acting in a cause and they are unable to agree whether the case should be affirmed or reversed, it is affirmed by operation of law.

Action in case. Appeal from the Circuit Court of DuPage county; the Hon. ARTHUR H. FROST, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed November 20, 1908.

THOMAS J. SUTHERLAND, for appellant; EDWARD J. BRUNDAGE, STEPHEN S. GREGORY and CHARLES WAYNE, of counsel.

LOESCH, SCOFIELD & LOESCH, for appellee; L. C. COOPER and CHARLES J. SCOFIELD, of counsel.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

This is an action in case begun the 16th day of May, 1895, in the Circuit Court of Cook county, Illinois, by

the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company against the city of Chicago to recover three fourths of the damages sustained by it on account of the destruction of property of which "the plaintiff was possessed as of its own property," during riots there in July, 1894.

The declaration avers that the plaintiff is a corporation of the state of Illinois and other states; that the defendant is a municipal corporation of said state; that on July 6, 1894, plaintiff was a common carrier of freight and passengers over a line of railroad leading from the city of Pittsburgh in the state of Pennsylvania to the southern boundary of the city of Chicago, at a point near the intersection of Western avenue with said southern boundary line, thence northerly within the limits of the city of Chicago across various streets to near Canal street; that "plaintiff was possessed as of its own property of a large quantity of railway equipment, supplies, goods, merchandise and property," describing in detail a large amount of property consisting of railway equipment of various kinds and merchandise of the value of, to wit, \$500,000, and particularizing the extent and places of loss; that on, to wit, the day and year aforesaid, and within the territorial limits of the city of Chicago aforesaid, in consequence of a certain mob or mobs, riot or riots, each of which was composed of twelve or more persons within the territorial limits of said city, a large quantity, to wit, all the above described equipment and property, was destroyed, to wit, etc.; that the said property, goods, etc., at the time of said injury were not in transit; that said injury and destruction were not occasioned or in any way aided, sanctioned or permitted by any carelessness, neglect or wrongful act on the part of the plaintiff, or through any neglect on the part of the plaintiff to use reasonable diligence to prevent said injury and destruction. It is further averred that the plaintiff within thirty days after said injury

and destruction of said property, to wit, on August 6, 1894, gave due notice to said defendant of said injury and destruction and then and there demanded payment of three-fourths of the amount of said loss and damages, to wit, \$337,268.25, whereby and by reason of the premises, and by force of the statute in such case provided, it became and was the duty of said defendant to pay to said plaintiff the sum of \$337,268.25, etc. The defendant did not demur to the declaration but filed the general issue.

In August, 1904, the plaintiff applied for a change of venue from Cook county because of the prejudice of the people. An order granting a change of venue to DuPage county was made in December of that year. The plaintiff thereafter in March, 1905, moved for a change of venue from all the judges of the sixteenth circuit, one of the judges of said sixteenth circuit being now one of the justices of this court; that motion was allowed and the cause was at the request of the said judges of the sixteenth circuit, tried by a jury before one of the judges of the seventeenth circuit in DuPage county, the trial lasting from May 1 to August 26, 1905. A verdict was returned in favor of the plaintiff for \$100,000; motions for a new trial and in arrest of judgment were overruled and judgment was rendered on the verdict on September 25, 1905. The defendant appeals to this court.

A change of venue having been taken from one of the justices of this court, he deems it his duty to refrain from taking part in the consideration of this appeal. The record is a very long one, consisting of more than 11,000 pages, the printed abstract containing more than 3000 pages, and the case appears to have been very closely contested. Objections were made to almost every step taken by the plaintiff in the case, and exceptions were preserved to the rulings of the court. Many assignments of error have been argued in detail, and they present questions some of which are new,

serious and important, concerning the competency of the evidence admitted for the plaintiff and the right of the plaintiff to recover for some of the property that was destroyed. The case was continued from time to time in this court by agreement of the parties until it was argued and submitted for adjudication at the April term, 1908.

It is insisted that the court erred in granting a change of venue from Cook county to DuPage county, and that the very great preponderance of the showing made by the parties demonstrated that there was no reason for changing the venue from the county where the suit was begun. Affidavits were made by eleven persons in support of the petition for a change of venue, while seventy-five persons made counter affidavits. The petition was addressed to the sound legal discretion of the court. The number of affidavits on either side is not necessarily a controlling factor in passing on such an application. The defendant went to trial in the Circuit Court of DuPage county without objection. Where a change of venue is improperly granted the proper practice for the party complaining seems to be to move to remand the cause to the county from which it was sent, and if the motion is overruled to take an exception. *Johnson v. Von Kettler*, 66 Ill. 63; *Hitt v. Allen*, 13 Ill. 592. This was not done. Moreover the appellant did not include any such reason in its written motion for a new trial, wherein the grounds of the motion were specified in detail. *Yarber v. Chicago & Alton Ry. Co.*, 235 Ill. 589. If, however, the original exception to the order granting the change saved the question for review, yet as the affidavits were conflicting and the matter within the sound discretion of the court, we should not feel warranted in reversing because of the change of venue.

The action is based upon a statute of this state providing as follows:

“That whenever any building or other real or per-

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sonal property, except property in transit, shall be destroyed or injured in consequence of any mob or riot composed of twelve or more persons, the city, or if not in a city then the county in which such property was destroyed, shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured for three-fourths of the damages sustained by reason thereof.

* * * * *

“No person or corporation shall be entitled to recover in any such action if it shall appear on the trial thereof that such destruction or injury of property was occasioned or in any way aided, sanctioned or permitted by the carelessness, neglect or wrongful act of such person or corporation; nor shall any person or corporation be entitled to recover any damages for any destruction or injury of property as aforesaid, unless such party shall have used all reasonable diligence to prevent such damage.

* * * * *

“No action shall be maintained under the provisions of this act, by any person or corporation whose property shall have been destroyed or injured as aforesaid, unless notice of claim for damages be presented to such city or county within thirty days after such loss or damage occurs and such action shall be brought within twelve months after such destruction or injury occurs, * * *”

It is urged the motion in arrest of judgment should have been sustained because the declaration is insufficient in that it does not state a cause of action by failing to state facts but only stating conclusions in several particulars. It is argued (1) “that ownership is not alleged as a conclusion, nor by way of uncertain or incomplete statement, by way of argument, by evasion, nor is there any allegation from which it can necessarily be inferred. All that is alleged is possession”; (2) “that the declaration should locate the mob as within the city of Chicago”; (3) the statute “requires that such party shall have used all reasonable diligence to prevent such damage,” while the declara-

tion only avers that the injury was not occasioned through any neglect on the part of the plaintiff to use reasonable diligence to prevent such injury; (4) that "the declaration does not aver that a notice of plaintiff's claim for damages was presented to the city within thirty days after the destruction or damage to its property occurred."

The numerous alleged defects in the declaration which have been presented for our consideration are purely formal. The defects complained of could not have been reached by a general demurrer. They could only have been grounds for a special demurrer assigning the causes. A judgment after verdict can only be arrested for substantial faults. All defects which would not have been fatal on a general demurrer are cured by pleading to the issue, and are aided by verdict. When the pleading states the essential requisites of a cause of action, the court will presume that the particular fact or circumstance which appears to be defectively or imperfectly stated or omitted was proved at the trial. A defective or inaccurate statement of a cause of action is cured by a general verdict but where no cause of action is stated a verdict will not cure the defect. Gould on Pl., chap. X.

Counsel for appellant state in their original argument (p. 21): "The declaration states the name of the plaintiff. It states that 'said plaintiff was possessed as of its own property,' of the railway equipment, etc., described and claimed to have been injured or destroyed, and for which judgment is asked. It also avers 'that the property of the plaintiff was destroyed or injured.' These averments only amount to an assertion that the plaintiff *was the owner* of the property mentioned and that the legal title was in the plaintiff. Such an averment is only a mere statement of a conclusion of law and amounts to nothing as an averment." At common law the possessor of personal property is *prima facie* the owner of the property.

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The averments that "plaintiff was possessed as of its own property," and "the property of the plaintiff was destroyed or injured," amount to an allegation of ownership by the plaintiff, when the declaration is first questioned after verdict. *Beigen v. Riggs*, 34 Ill. 170. On a motion in arrest of judgment "every intendment will be indulged in favor of the declaration, and if it contains terms sufficiently general to comprehend by fair and reasonable intendment any matter necessary to be proved, and without proof of which the jury could not have given the verdict, the want of an express averment in the declaration has been cured by the verdict." *Danley v. Hibbard*, 222 Ill. 88; *Fountain Head Drain Dist. v. Wright*, 228 Ill. 208. We hold that the conclusion to be drawn from the averments of the declaration is that the plaintiff is the owner of the property destroyed or injured.

The declaration avers that "within the territorial limits of the city of Chicago, aforesaid, in consequence of a certain mob or mobs, riot or riots, each of which was then and there composed of twelve or more persons within the territorial limits of said city of Chicago, a large quantity," etc. This language locates the mob within the city of Chicago in the language of the statute and fully answers the second reason urged in arrest of judgment.

We do not think it necessary to comment on the third and fourth reasons urged in arrest of the judgment further than to state that under the rule announced in *Danley v. Hibbard*, *supra*, the allegations contained in the declaration concerning these matters are sufficiently general to comprehend by fair and reasonable intendment the matters necessary to be proved in the respects complained of, and the court did not err in overruling the motion.

The proof shows that in June, 1896, a general strike was declared by the American Railway Union, and that many thousands of railway employes abandoned their

work. This general strike was a sympathetic strike in aid of the employes of the Pullman Company, who had been on a strike since some time in May of that year. The city of Chicago appears to have become the center of the strike hostilities. The employes of the railroads having abandoned their work and refusing to return, the railroads brought to Chicago "strike breakers" and endeavored to run their trains with these men, many of whom were inexperienced but were willing to take the places of the old employes. When the railroads began to try to operate their trains with the strike breakers and new men, mobs began to gather along the lines of the railroads and interfered with the operation of the trains. Counsel for appellant state in their argument that "The fact that so many men became idle at once, in connection with the animosities engendered and the doubt and uncertainties existing as to the future relations of the men with the companies, produced a condition somewhat alarming and was supposed to threaten the peace and welfare of the city. The strike also succeeded in stirring up to some extent the rougher elements." At the commencement of the strike there were 3000 policemen in Chicago and about 500 more were sworn in on the fifth and sixth of July. The United States Marshal, who under ordinary circumstances has ten deputies, had about 1600 special deputies, all sworn in because of the strike difficulties, and he swore in some 2600 railway employes as special deputies of the various railroads in Chicago who acted under the direction of the railroad officials during the strike in endeavoring to protect the railroads against the disorderly persons. About 250 of the special deputies were employes of plaintiff and acted under plaintiff's officials. On July 6, the mayor of the city of Chicago sent to the governor of Illinois a request by telegraph for the state militia to aid in preserving the peace and suppressing violence. The governor in compliance with the request sent several regiments of

militia to Chicago. The president of the United States also ordered government troops sent to Chicago to assist in quelling the disturbances. The regular troops arrived in Chicago on the fourth of July. Between the first and seventh days of July, but principally on the sixth, a large amount of railroad equipment and several hundred cars, many of them stored with merchandise, were totally destroyed by fire in the yards of the plaintiff in Chicago. The equipment destroyed and many of the cars destroyed belonged to the plaintiff, but a great number of the cars destroyed were only used by plaintiff and belonged to other railroads. The merchandise destroyed belonged to third parties.

Appellant argues that the notice and demand for damages offered and admitted in evidence, which is a notice and demand combined, is not sufficient to sustain the action. This notice and demand is in writing, signed by the second vice-president of appellee, the officer who under appellee's by-laws has charge of the legal and contract department. It is in the language of the statute, and has a schedule attached describing the property in detail, and whether destroyed or injured, the place of loss, the date of the loss, and the amount of the damage to each item of property; it was served by the solicitor for appellee on the mayor of the city by handing him a true copy on July 28, 1894. Many extremely technical points are attempted to be urged concerning this notice. It was clearly sufficient, and we fail to find any merit in the points raised in the argument upon this contention. •

Appellant insists that it was not shown by the evidence on the trial that appellee's property was destroyed in consequence of any mob or riot composed of twelve or more persons. The property destroyed was mostly in two of appellee's yards; one called the Brighton Park yards, located between Forty-third and Forty-seventh streets in Chicago; the other, the Fifty-ninth street freight yard, located between Fifty-fifth

and Sixty-third streets in Chicago. The appellee's railway is properly known as the Pan Handle, and is frequently so called by the witnesses.

A great number of witnesses testify to acts of violence and to facts showing that a reign of terror existed at both yards, that the crowd in the vicinity of the yards were overturning cars, setting fire to them, obstructing the police of the city, and threatening and terrorizing the employes of appellee that remained at work or were newly employed. The evidence shows that some twenty-three railroads running into Chicago were involved in this strike. The railroads acted together in resisting the strike through what is known as the General Managers Association, which had an office in the Rookery Building in Chicago.

John M. Egan was in charge of this office, and to him the officials of the railroads severally reported where disturbances and difficulties existed or were expected from the strikers or their sympathizers. Egan communicated the information to the police inspectors and to the chief of police. As early as June 29, Egan, acting for the appellee and other railroads, sought to have the mayor of the city secure the state militia to preserve the peace, and made arrangements to convey peace officers to where, from the reports received, difficulties might be expected. On the afternoon of July 6, Charles Watts, superintendent of the Pennsylvania lines west of Pittsburgh, which include the Pan Handle, acting for the appellee, called on the chief of police with reference to furnishing protection for appellee and told him of threats and requested that officers should be sent to its yards; and again on the same evening Watts asked the city officials over the telephone why men were not sent to the yard and was told the city did not have the men to send. Appellee's Fifty-ninth street yard is the yard most distant from the center of the city. The rioters from the evidence appear to have first fired cars in the Brighton Park

yards, and then went south into the Fifty-ninth street yard where from 800 to 900 cars were stored. Henry C. Maher, a day watchman in the Fifty-ninth street yard, testified that about 12:30 on July 6 about fifty people came from Forty-third street and turned over a car at the north end of the Fifty-ninth street yard, and that at about four o'clock, six or eight persons came from the vicinity of the Northern Pacific tracks, and three or four of them went to the office and tore down the telephone, and some boys undertook to take out a handcar; that he chased them away and put the handcar off the track, and on going back to the office saw a car had been fired, and being unable to put it out went to the telephone, when he saw that another fire had been started, further north, and then he telephoned to the city offices that fires were being started; that at that time there was a big crowd of men, a couple of hundred, working south through the yard.

Stephen Lancto, a carpenter working on a roof, testified that he saw twenty to twenty-five men at Fifty-fifth street throwing at the little flag house and breaking the gates; that he saw these men go south towards Fifty-ninth street along the tracks, and could see a blaze once in a while where another fire would be started; that he saw this in several places. The next day he saw that the cars had been burned.

Homma Huicanga, a gardener, living three blocks south of Fifty-fifth street on the west side of plaintiff's tracks, testified that on the afternoon of the fire he saw many people, probably fifty, come and tip over some cars; one car was tipped on appellee's tracks at Fifty-fifth street. Afterwards he saw a fire near Fifty-fifth street, and then right along the line up to Sixty-third street as far as he could see the cars were on fire; that there were from fifty to two hundred people there, and some boys with a handcar were going up and down and going into the cars with a five gallon oil can, and in a few minutes fire would come out.

Oscar Therien, a foreman in a cigar factory, who lived at Fifty-sixth street and Western avenue at the time of the fire, testified that hundreds of cars were destroyed; that the yard was filled with cars before the fire; that he saw a crowd of a hundred or more telling an old man to come down from the tower at Fifty-fifth street, that they were going to fire the tower; that a man came with an oil can and set the tower on fire, that they broke the gates at both sides; that the crowd followed a fellow with a handcar; that "they went right into the Pan Handle yards, and then the whole thing was in blazes around here and there."

Mrs. Bertha Delude testified that on the afternoon of July 6th she saw three or four cars burning on the Pan Handle track between Fifty-first and Fifty-second streets; there was a big crowd around those cars, over fifty persons, who were throwing stones at a passenger train.

Emma Mansel testified to the crowd moving south from Brighton Park yard to the Fifty-ninth street yard; that there were two hundred to three hundred persons right on the tracks, and they went into the yards at Fifty-fifth street and started fires there.

Josephine Osburn testified to seeing about one hundred men come up the track, upset and burn a car; that she saw about eight of them go into the yards towards Fifty-ninth street; they were gone about half an hour and when they came back all the cars were on fire; that the men ran Schwartz, the gateman, away, and that a boy climbed into the tower, saturated it with kerosene and set it on fire; that Schwartz ran away at that time to keep from being killed; that a gang of about fifteen men told the people in the depot to get out, cursed them and called them scabs.

Frank Schwartz, the gate crossing or tower man at Fifty-fifth street, testified that he saw trouble at Fifty-second street; there was a big crowd there and they dumped a car at that street; this was about two o'clock

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in the afternoon and there were thirty or forty of them. Some of the crowd came to where the witness was and climbed up on the tower and lighted a fire there; they broke down the gates; there were two hundred people there at that time.

Charles E. Danke, a police officer at the time of the fire, testified he, with other policemen, was sent over to the Fifty-ninth street yard about seven o'clock and there was a crowd of from three to four hundred people around the track and at least half of the cars standing there were on fire; "when we got there the crowd was running in and around the cars, some of them on top of the cars, carrying firebrands from car to car, I saw them break open car doors and carry fire from one car to another"; that there were from eight to twelve policemen there, but no arrest was made that he knew of.

. Paul Bessmer, then a police officer, testified that he, with eight or ten officers and a sergeant, went to the Fifty-ninth street yards; when they got there the tower house was burning; a good many hundred cars were there and they started to burn in all directions, one car here and another there; they tried to get the crowd away, there were several thousand people around there; some of them tried to overthrow the cars, and there was fire in different places; they stayed until the troops came.

A great many other witnesses testified in a similar strain to the origin and progress of the fire from the Brighton Park yards to and in the Fifty-ninth street yards. The evidence shows that at some places there were but a few persons engaged in the work of destruction, at others there would be a crowd of twenty or thirty, and from that number up to several hundred, all co-operating and encouraging each other in the destruction of property, breaking switches, and overturning cars on the tracks so as to obstruct the movement of cars or trains, and setting fire to cars and any-

thing that would burn. The evidence would appear to be conclusive that the property was destroyed in consequence of a mob or riot composed of more than twelve persons. The evidence is also clear that the appellee used all reasonable diligence to prevent such damage with such few employes as remained at work, in securing the assistance of United States marshals, in making demands for police protection, and by requesting the city authorities to secure the services of the state militia in advance of the strike assuming serious proportions.

On July 6, while the strike was in progress and property was being destroyed, John P. Hopkins, the mayor of Chicago, sent a telegraph message to John P. Altgeld, the governor of the State of Illinois, notifying him that there were within the city "numerous riotous bodies of men acting together by force with attempt to commit violence, to offer violence to persons and property, and by force and violence to break and resist the laws of the state; that the civil authorities of this city by means of the large territories over which these men are scattered, the comparatively small number of police and other police officers at the disposal of said authorities and the large number of said riotous bodies of men, are unable to restore the peace and to prevent violence to persons and property"; and requesting that the governor order five regiments of the state militia immediately to assist the civil authorities in suppressing violence. This dispatch was offered by appellee and admitted as original evidence over the objection of the appellant. The dispatch was prepared by the legal department of the appellant city and signed by the mayor. It is insisted on the part of appellee that it was competent as part of the *res gestae*. The description of the riotous conditions was not a part of the *res gestae* for the reason that it was not a spontaneous expression of the mayor but was a deliberate statement of the legal department of the city

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prepared for the purpose of securing troops. Declarations to be *res gestae* must be spontaneous and not statements which are deliberate and prepared for a purpose. The mayor simply signed a paper prepared for his signature, possibly knowing nothing about the facts except as they were reported to him. The mayor afterwards was a witness for appellant and testified to his knowledge of the facts quite differently from the language of the dispatch, and the dispatch might thereafter have been competent by way of impeachment, but it will scarcely be insisted that it was competent to impeach him before he had testified; he might not have been called as a witness if the dispatch had not been admitted in evidence. We hold the dispatch was improperly admitted in evidence, but the facts stated therein were so conclusively proved by competent evidence that its admission was harmless error.

After a careful consideration of the case the two members of the court taking part in this case are clearly of the opinion that under the pleadings and the evidence no other verdict than one in favor of the appellee could reasonably have been returned.

We are unable to agree upon the right of appellee to recover for the destruction of merchandise belonging to other parties and of cars belonging to other railways, and upon the competency of much of the secondary evidence composed of copied records of train reports, "Historical records" of cars, and the "Borner Record," which is a record of the movements of cars upon appellee's lines in Chicago, which were admitted in evidence over the objection of appellant. One of the justices is of the opinion that in view of the facts and questions of law upon which we agree, and the great value of the property destroyed, there being about 100 cars destroyed in the Brighton Park yards and nearly 700 in the Fifty-ninth street yards, many of which were loaded with merchandise, besides much other property, three-fourths of the value of which far exceeded the

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amount of the verdict, that there is ample evidence to sustain the verdict and that the errors complained of concerning which we agree, if they were errors, are not of sufficient magnitude to require a reversal, while the other justice is of the opinion that the matters complained of and concerning which we disagree are errors and are of such importance that they require a reversal of the case. There being but two justices acting in the case, and they being unable to agree as to whether the case should be affirmed or reversed, it is affirmed by operation of law. *Binder v. Langhorst*, 139 Ill. App. 493.

Affirmed.

Mr. Justice WILLIS took no part in the consideration of this case.

**Edward Brophy, Appellee, v. Illinois Steel Company,
Appellant.**

Gen. No. 5,017.

1. VERDICT—*when not disturbed as against the evidence.* Where there is evidence upon which a verdict may be sustained, it will not be set aside on review as against the evidence unless passion, prejudice or other undue influence has entered into the verdict.

2. VERDICT—*when not excessive.* In an action for personal injuries, a verdict for \$5,000 is not excessive where the injuries were to a boy of the age of 16 years and consisted, in addition to suffering, in the loss of a leg.

Action in case for personal injuries. Appeal from the Circuit Court of Will county; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the April term, 1908. Affirmed. Opinion filed October 14, 1908.

GARNSEY & WOOD, for appellant; KNAPP, HAYNIE & CAMPBELL, of counsel.

J. W. D'ARCY, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

Edward Brophy, appellee, brought suit and recovered a verdict and judgment for \$5000 damages against the Illinois Steel Company, appellant, for personal injuries. The declaration contains three counts. The first count charges the defendant company with negligence in failing to provide a reasonably safe place, appliances and machinery, in and around which the plaintiff, then and there an employe of defendant of the age of sixteen years, could work in the performance of his duties as a switchman, and that by reason of the unsafe place and appliances plaintiff was injured by a heavy mould of defendant's falling from an elevated crane without notice or warning to plaintiff, whereby, etc. The second count alleges negligence in permitting an elevated crane and machinery belonging thereto to become worn, defective, impaired and unsafe for the conveyance of certain moulds weighing, to wit, ten tons, etc., whereby, etc. The third count alleges negligence in failing to inspect and repair and in permitting its elevated crane to become defective and unsafe, etc. Each count avers that plaintiff was in the exercise of due care, and that the injury was not caused through the negligence of a fellow-servant or from an assumed risk. It is contended that there is no proof sustaining the third count, and that the court should have directed a verdict for the defendant on that count. The record does not show that any such instruction was asked, and shows that only a general instruction to find for the defendant was requested at the close of all the evidence. If there is evidence on which the verdict can be sustained on any count then there was no error in refusing that instruction.

The proof shows that on Sunday, September 16, 1906, the date of the accident, the appellee was a boy sixteen years of age working as a switchman in the yards of appellant company at Joliet where he had

been employed three or four months; that appellee had only worked at the place where he was injured upon one occasion before the day of the injury, and that the accident happened in the convertor mill of appellant while appellee, acting as such switchman, was endeavoring to get upon the foot-board of a small locomotive engine. This engine is used in the steel mills and is so small that only the engineer can ride on it, and he acts as engineer and fireman. The engine moved small cars called buggies for transporting moulds on a narrow gauge track two feet and eight inches wide. The cars are about four feet long, three feet wide and two feet high. Three of these mould cars with a "push-car" and engine make a train. Each mould car is supposed to carry two moulds, but a train only carries five moulds. Between the engine and the train is a small "push-car" with a steel top of the same size as the others. The "push-car" between the engine and train contains the coupler for attaching the mould cars to the engine. The couplers are operated by levers on the push-car; a lever is on each side of the push-car so that a man standing on the foot-board of the engine can operate the coupler from either side. The moulds are made of cast iron, and are about two feet square at the bottom and six feet high, and each weighs two tons. The moulds are lifted on and off the cars by a crane with a chain and hooks; two hooks catch into lugs near the top of each mould. The crane is an electric crane with a universal motion by which heavy weights can be moved in any direction. The craneman manages the crane from a cage about thirty-five feet above the tracks. These small trains are operated by two men, the engineer, and a switchman whose duty it is to turn switches and couple and uncouple the cars from the "push-car."

The mills were closed on the day of the accident, with the exception that moulds were being carried on these small trains to and from what is called the clean-

ing platform where the moulds and buggies were cleaned. Sometimes these moulds were lifted with the crane off the buggies at the platform to get the scrap off the buggies. After being cleaned the moulds were carried on the buggies to other parts of the mills. The cleaning platform is four or five feet wide, fifteen feet long and six feet high. On the south side of this platform is a track running in a curve, while on the north side is a straight track; the curved track unites with the straight track about forty feet from either end of the platform, and there is some three or four feet of space on each side between the tracks and the platform. The engine runs in with a train of cars on the track on one side of the platform, leaves the train by the platform, then runs upon a switch and runs back on the other track and takes the cars with the moulds which have been cleaned from the other side of the platform and so the work goes on, there having been about two hundred moulds cleaned that day. At the time of the injury a train of cars with moulds was standing, being cleaned on the south track at the southeast corner of the platform. The engine came into the convertor mill with a train from the east, and was moving on the straight track on the north, towards the platform. The appellee threw the switch, which was on the south side of the track behind the train, and then ran on the south side of the train, which was moving slower than a walk, to get on the foot-board ahead of the push-car to uncouple the train when it got to the platform. The crane had picked up two moulds at the east end of the platform between the tracks, and had raised them about two feet from the ground between four and five feet south of the north track as the engine cleared the moulds by about four feet. The evidence does not disclose whether these moulds were being put on or off the buggies on the south track. Some other employes called to the engineer to stop as they saw the moulds being raised

close to where the engine would pass, but the engineer did not hear them and appellee ran between the moulds which were being raised and the train. The craneman undertook to stop the moulds and keep them suspended while the train passed, but the brake slipped and the moulds fell to the ground and one of them toppled over upon the push-car catching appellee and breaking his leg below the knee so that it had to be amputated.

There are but two questions involved: first, was the appellee at the time of the injury in the exercise of ordinary care, or did his acts contribute to the injury, and second, was the defendant company negligent in the care of the crane?

The proof shows that appellant had actual notice that the crane had a defective brake, which had been slipping more or less for about two months. The craneman testified that he had complained about the brakes; that he had asked to have them fixed many times, but they would not fix them; "they all knew the brakes would not hold"; it would not do any good to complain because they would not fix them; that the brake had slipped three weeks before the date of this accident in the presence of the foreman, and that the foreman then said to the craneman, "why don't you fix it?" and the craneman replied that he could not fix it, and they let it go that way. The evidence is clear that the brake slipped very often, and there is no evidence showing that any attempt was made to repair the brake after the foreman knew about its slipping. The foreman testified he did not remember about the complaint made by the craneman that the brake needed fixing, but would not say the complaint was not made, and said he would not have fixed it anyway; that it was up to the mechanical department to fix it. It is also shown that the appellee had not heard of the brake slipping, that he knew nothing about it and did not know but that it was in perfect order. It is conclusively shown that the brake was out of repair and the fore-

man and craneman knew it, so that the negligence of appellant was clearly proved.

Appellant contends that appellee was not exercising ordinary care for his own safety but that he was negligent and contributed to his own injury. The switch that appellee had turned just prior to the time of the injury and from which he was running was on the south side of the train, the side upon which appellee was injured. There is a maze of tracks in the vicinity where the injury occurred. There was a space of four or five feet between the moulds that were suspended on the crane and the train by the side of which he ran to get on the push-car, although some of the evidence tends to show the space was less. It was the duty of the appellee to run and get on the foot-board of the engine to work the coupler on the push-car. The side of the train the switch was on was the side the switchman would naturally take to overtake the push-car. There was at least as much space between the suspended moulds and the track as there was between the cleaning platform and the track. There was ample room between the moulds and the train for the appellee to pass in safety to reach the push-car if the machinery of the crane had been in proper condition. The appellee had only worked at the place where he was injured on one other occasion before the day of the injury, which was the day he became sixteen years of age; he knew nothing about the brake being defective on the crane; he had never seen or heard of it slipping. Appellee did not pass under the mould but by its side, and because of the brake slipping the mould fell and toppled over against the push-car, crushing his leg. If the brake on the crane had not slipped appellee would not have been injured, and it would not have slipped if it had been in proper condition. There is no proximate connection between the action of the appellee in his attempt, in the performance of his duty, to get on the engine foot-board and his injury. The

jury, finding for the appellee, found from the evidence that the appellee was exercising ordinary care and that he was not guilty of contributory negligence. The jury were very fully and particularly instructed that, before appellee could recover, he must prove by a preponderance of the evidence that he was in the exercise of ordinary care and that he was not guilty of negligence contributing towards causing his injury. That was a question purely for the jury, and there being evidence upon which the verdict can be sustained we should not disturb it.

Appellant argues that the damages awarded are excessive, and states that the loss will be but a slight obstacle to appellee and will help him gravitate to an employment requiring a higher degree of intellect than a switchman, and that the payment of \$5000 "into the hands of a young boy often proves his ruin." Such arguments do not appeal to reason. Appellant is not an eleemosynary corporation, and when it runs its machinery out of repair it is not because it is concerned for the financial betterment or intellectual elevation of its employes. The fact that appellee may secure a cork leg will not relieve him of many of the difficulties in life resulting from the loss of his natural leg. We think the damages awarded are reasonable compensation for the pain, physical suffering, surgical treatment and reduction of his capacity to earn money and pursue the course of life which he might otherwise have done. We think the sum awarded is a cheap price for the leg of a young man. The judgment is affirmed.

Affirmed.

Mr. Justice DIBELL having presided at the trial of this case in the lower court, took no part in its consideration here.

Kyser v. Miller, 144 App. 316.

Frank L. Kyser, Appellee, v. M. L. Miller, Appellant.
Gen. No. 5,046.

1. **APPEALS AND ERRORS**—*what not final judgment.* A judgment entered upon a particular issue in a cause is not final; the entire case must be disposed of by a judgment before the right or obligation to appeal arises.

2. **CONTRACTS**—*what does not impart validity to void.* A note void by virtue of statute even in the hands of an innocent purchaser for value before maturity, cannot be rendered valid by matter of estoppel, as, for instance, the assurance of the maker to the purchaser that it was a valid obligation.

Assumpsit. Appeal from the Circuit Court of Livingston county; the Hon. GEORGE W. PATTON, Judge, presiding. Heard in this court at the April term, 1908. Reversed and remanded. Opinion filed October 14, 1908.

Statement by the Court. This is an action of assumpsit, brought in the Circuit Court of Livingston county, by Frank L. Kyser, appellee, against M. L. Miller and H. B. McGregor upon a promissory note dated April 27, 1905, for \$500 payable to the order of H. B. McGregor, one year after date, with interest from date at six per cent. The note was indorsed by McGregor to appellee before maturity. The declaration contains two special counts against the maker and the indorser of the note and the common counts. The defendant Miller filed a plea of the general issue and special pleas alleging in various forms that the consideration for the note was money lost in illegal speculation and gambling on the market price of grain, options to buy and sell grain at a future time, puts and calls and margins for differences, etc., and averring that the note was void and of no effect under section 131 of the Criminal Code. The plaintiff filed a replication to the special pleas averring that the defendant should not be admitted to plead that the consideration of the note was for gains and losses in gambling, etc.,

because the plaintiff purchased the note before maturity, and before purchasing inquired of the defendant if the note was a just and legal obligation and all right, and the defendant Miller thereupon stated the note was given for value received, and that he, the plaintiff, might safely buy the same, and at that time the plaintiff had no knowledge of the facts attending this giving of said note and believing and relying on the statements of defendant Miller to be true, plaintiff was misled and induced to buy said note, and would not have purchased said note but for said statement, and prays judgment if the said Miller ought to be admitted against his own acknowledgment to plead, etc. The defendant filed a demurrer to this replication which was overruled. A rejoinder was then filed to the replication on which issue was joined. The defendant then withdrew the general issue and at the January term, 1907, the issue on the replication of estoppel was tried before a jury. At the close of the evidence the defendant requested an instruction directing a verdict for the defendant which was refused. The jury returned a verdict finding the issue in favor of plaintiff but did not assess plaintiff's damages. The defendant then made a motion for a new trial which was overruled at the May term. Judgment was entered at the October term, on December 30, 1907, that the defendant be barred from pleading the special pleas and that plaintiff recover his costs. The defendant Miller excepted to the action of the court in overruling the motion for a new trial and entering a judgment, and prayed an appeal and filed a bill of exceptions. The defendant Miller then entered a motion for leave to refile the general issue. This motion was overruled. He then moved that plaintiff's damages be assessed by a jury; this motion the court allowed. After various other motions and rulings the defendant Miller at the October term, 1907, was permitted to refile the general issue and an affidavit denying the execution of the note in manner and form as alleged in the declaration. In

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the note sued on the words "if not paid when due," referring to the interest, are erased. The defendant in his evidence on the final hearing claimed the words "if not paid when due" were erased after the delivery of the note. A trial was had at the January term, 1908, on the issue of the execution of the note, and a verdict was found for plaintiff assessing his damages at \$583.30. A motion for a new trial was overruled and judgment rendered on the verdict. The defendant Miller duly preserved exceptions and appeals to this court.

THOMAS KENNEDY, JOHN F. BOSWORTH and McIL-
DUFF & THOMPSON, for appellants.

A. C. NORTON and WHITE & TUESBURG, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

The appellee has made a motion in this court to dismiss the appeal so far as the same affects the judgment of the Circuit Court of December 30, 1907, on the issue of estoppel, on the ground that it is a final judgment and no appeal lies therefrom unless prayed and perfected at the term at which it was rendered. There was only one issue in the case when the first trial occurred. The jury when it found that issue for the plaintiff did not assess plaintiff's damages. On November 7, 1907, the appellant by leave of court refiled the plea of the general issue. Thereafter on November 19, appellee moved for judgment on the verdict of estoppel. The judgment rendered December 30, on the issue of estoppel, did not dispose of the case and was not a final judgment, and no appeal could be taken therefrom until a final judgment disposing of the case was rendered. *Wenon v. Fossick*, 213 Ill. 70, 115 Ill. App. 605; Practice Act of Ill. sec. 91. The motion to dismiss the appeal is therefore overruled.

Appellant assigns for error that the trial court erred

in overruling the demurrer to the replication of estoppel, filed in answer to the special pleas, which sets up facts which bring the consideration of the note within the provisions of the Criminal Code. Section 130 of the Criminal Code provides that whoever contracts to give another the option to buy or sell at any future time grain, etc., shall be fined, etc., and all contracts made in violation of this section shall be considered gambling contracts and shall be void. Section 131 provides that all notes made by any person where the whole or any part of the consideration shall be for money won by any gaming shall be void. Section 136 provides that no assignment of any such note shall in any manner affect the defense of the person executing the same. If the note was void because it was given for an illegal consideration, is the appellant estopped to plead the defense given to him by the statute, because he said to the appellee, before appellee purchased the note, that it was not given for any illegal consideration or any consideration which was contrary to the laws of the State of Illinois and thereby induced appellee to buy the note? The statute makes a note given in a gambling transaction void in the hands of an innocent purchaser, not as a favor to the signer of the note, but as a matter of public policy. If what appellant said can be construed as a promise there was no consideration for it and it was nothing more than a promise to pay a gambling debt. It was only a repetition of the original act of making the note. If a contract which is void or of no effect under the statute can be made a legal and valid contract by a subsequent statement of the maker, then the public policy of the state as declared by the statute can be forestalled, and the statute made of no effect. "It has been in general terms held that there cannot be any estoppel against showing that a contract is made void by the statute." *Dow v. Higgins*, 72 Ill. App. 303; *Treat v. Snyder*, 92 Ill. App. 458; *Durkee v. People*, 53 Ill. App. 396, affirmed in 155 Ill. 354; *Shenk v. Phelps*, 6

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Ill. App. 612; Bigelow on Estoppel, 558, note; Rosebrough v. Ansley, 35 Ohio St. 107; Coppell v. Hall, 7 Wall. (U. S.) 542; Oscanyan v. Arms Co., 103 U. S. 268. We hold that a contract which is made void by the statute as being against public policy cannot be made valid by matter of estoppel. The court erred in overruling the demurrer to the replication to the special pleas, and the trial on the replication of estoppel was upon an immaterial issue. The judgments on the two verdicts are reversed, and the case is remanded for further proceedings in conformity with the opinion of this court.

Reversed and remanded.

Peter Eldem, Appellee, v. Chicago, Rock Island & Pacific Railway Company, Appellant.

Gen. No. 4,927.

1. VERDICT—*when set aside as against the evidence.* While it is true that it is the province of the jury to determine conflicts in the evidence and the duty of the court to give their verdict due and careful consideration, yet when it is apparent that such verdict may have been brought about by some error of law on the part of the trial court or by passion, prejudice or bias on the part of the jury, it is equally the duty of the appellate court to set aside the judgment.

2. VERDICT—*when set aside notwithstanding remittitur.* A large verdict reduced by a considerable remittitur may be set aside on review if such action would best tend to promote an impartial administration of justice, as such a verdict which does not show complete accord between the trial judge and the jury is not entitled to the same presumptions as being fair as are accorded to a verdict where no such discord appears.

3. INSTRUCTIONS—*when upon preponderance of evidence erroneous.* An instruction upon this subject is erroneous which merely tells the jury "that the weight of the testimony does not necessarily depend upon the greater number of witnesses sworn on either side of the question in dispute," but that the jury are at liberty, as jurors, to consider all the facts and circumstances appearing from the evidence in the case and determine from that which of the witnesses are worthy of the greater credit.

DIBELL, J., dissenting.

Eidem v. C., R. I. & P. Ry. Co., 144 App. 320.

Action in case for personal injuries. Appeal from the Circuit Court of Rock Island county; the Hon. FRANK D. RAMSAY, Judge, presiding. Heard in this court at the October term, 1907. Reversed and remanded. Opinion filed April 14, 1908. Rehearing denied October 14, 1908.

JACKSON, HURST & STAFFORD, for appellant; BENJAMIN S. CABLE, of counsel.

SEARLE & MARSHALL, for appellee.

MR. JUSTICE WILLIS delivered the opinion of the court.

As appellee, Peter Eidem, was crossing from a passenger car to the depot platform or station grounds at Moline, Illinois, he was struck by an engine of appellant, the Chicago, Rock Island & Pacific Railway Company, and his legs so mangled that they had to be amputated above the knees. He brought this action in the Circuit Court of Rock Island county to recover damages therefor. The declaration as originally filed contained four counts, to which, at the close of the evidence, by leave of court, five more were added. The court directed the jury to disregard the first count of the original declaration. The substance of the negligence charged in the various counts is, that appellant made it a practice not to stop its train but negligently slackened the speed and compelled plaintiff and the other workmen to leap therefrom while it was in motion; that it negligently ran its road engine at a high and dangerous rate of speed and at a rate of speed forbidden by an ordinance of the city of Moline; that it negligently ran its engine without continuously ringing a bell in violation of an ordinance of said city; that it negligently ran its road engine between the depot platform and the passenger car from which plaintiff was alighting. The declaration in each count also averred due care on the part of appellee while alighting from the car and crossing to appellant's depot platform. A plea of not guilty was interposed, a trial had

resulting in a verdict for appellee of \$25,000, a motion for a new trial was made, a *remittitur* was required by the court and entered for \$9,000, the motion for a new trial was overruled, judgment was entered on the verdict for \$16,000 and this appeal was taken by the defendant.

The evidence shows that appellant operated a double track railroad running east and west through the city of Moline, the east-bound track being next its depot. The space used for depot purposes consisted of a triangular strip of land extending from the east line of Thirteenth street to the west line of Fourteenth street in said city, a distance of 328.4 feet measured along the east-bound track, which strip outside the building was paved with brick and used for station purposes. Standing thereon with its west line 12.5 feet east of the east line of Thirteenth street, was the depot or station building 80.5 feet long and 26.77 feet wide, and adjoining it on the east, a baggage room, 24.2 feet long and 20.5 feet wide. Along the middle of the north side of the main part of the depot, extended a wooden platform about 40 feet long with steps at each end leading to the pavement. In January, 1906, appellee who lived at Moline entered the service of appellant and worked from 1 p. m. to midnight daily as freight truckman at Silvis, some six miles east of Moline. A number of men who lived at Moline and other stations west worked at Silvis, and appellant ran a train consisting of a switch engine and one passenger car from some point west of Moline to Silvis and back, to carry these laborers to and from their homes. At one o'clock a. m. on April 11, 1906, appellee with fifteen or twenty other workmen left Silvis on this work-train which proceeded to Moline on appellant's west-bound track. When it was between Fifteenth and Fourteenth streets, appellee went to the front platform, and between Fourteenth and Thirteenth streets stepped or jumped from the lower step and was struck by a road engine running east on the east-bound track.

Appellee testified that he went out on the platform when the train was between Fourteenth and Fifteenth streets and stayed there until they were opposite the depot, when he got off. Just as he stepped on the track he saw the light of the approaching road engine about ten or fifteen feet away but did not hear the bell ring at any time. The head light was not bright but reddish or yellow and the place where he stepped off was directly in front of the steps which go into the depot. On cross-examination, he stated that he was the first one out of the car and that he stood on the step and did not look. He did not know whether a train was coming or not. He thought if he had stuck his head out he could have seen. When he got off he did not look to see if anything was coming. The work-train was moving when he got off and he did not think of such a thing as a train coming in there and did not pay any special attention to anything but getting off. He had plenty of time to look if he had thought a train was coming. He never knew the train to stop when he got off. They always got off before it stopped. Henry Maude, who also worked at Silvis for appellant, and who was on the work-train at the time of the accident standing directly behind appellee on the platform when he alighted from the car, testified that the custom was not to stop this work-train when the men got off. At the time of the accident it was going at about two miles per hour. He did not hear a whistle sound or a bell ring on the road engine. Maude said that appellee at the time he was struck was right opposite the steps on the east side of the depot. In his judgment the road engine was going at from ten to fifteen miles per hour and had a red or yellow head light, which in his judgment was an oil light. When appellee was struck he was opposite the main door of the depot and when he was picked up he was four or five feet east of the baggage room. John Peacock testified that he went to the scene of the accident, where his attention was called to one of appellee's feet wedged

in the rail about five or ten feet east of the baggage room. Swan Larson, a patrol man at Moline, testified that he went to the scene of the accident and saw appellee's foot squeezed in between the rail and plank ten or fifteen feet east of the east end of the depot. Robert Carlson, employed by appellant at Silvis and on the work-train at the time of the accident, testified that sometimes the train would stop when it reached the station at Moline and sometimes it would not. He thought the train had stopped when appellee stepped off. The engine that struck him was going at the rate of from ten to fifteen miles per hour. He did not think the whistle was blowing. The engine had a light which he knew was not an electric light. Dale Baird, employed at Silvis by appellant and on the work-train at the time of the accident, testified that sometimes the train would stop at the Moline depot and sometimes it would not. The engine that hit appellee was going at the rate of from fifteen to twenty miles per hour and the work-train stopped as it passed. Appellee was about opposite the northeast corner of the baggage room after he was struck. Witness did not hear the bell on either engine and did not know whether the whistle on either engine was blown. Richard Thomas, fireman on the road engine, testified that their engine was going about four miles per hour and that its bell was ringing when it passed through Moline. When it stopped, the tender was opposite where appellee's legs were cut off, just ninety-two feet from the west edge of Fourteenth street. The work-train was going about as fast as their engine when appellee got off. On cross-examination he testified that the engine had an electric light and that he first saw the car of the work-train when the road engine was just east of Thirteenth street. The switch engine was crossing Fifteenth street when he first saw it. The whistle on the road engine was not blown then because there was no reason for it. He thought they had plenty of time to meet the switch engine before it reached the depot.

They passed about 100 feet east of the depot and the road engine stopped in about sixty-eight feet. When it stopped it was ninety-two feet from the west line of Fourteenth street. Appellee was struck 117 feet east of the east end of the baggage room. Henry Geisenhagen, engineer on the road engine, testified that the engine had an electric head light and that it was lighted that night. It also had an automatic bell ringer and the bell was ringing when they passed through Moline. He first saw the switch engine when it was near Fifteenth street. His engine was going four or five miles per hour and the switch engine about as fast. He stopped his engine about seventy or eighty feet from Fourteenth street after appellee was struck. The road engine did not come between the work-train and the depot, and the train was not at the depot at the same time as the road engine. The work-train stopped close to Thirteenth street. James Hughes, fireman on the switch engine, testified that the road engine had an electric head light and was going about five miles per hour. He did not remember any nights that they had not stopped at Moline depot. He heard the bell on the road engine ring and said that appellee was about eighty feet from the depot when he was struck. The switch engine stopped so that the pilot was even with the baggage room, and as the cabs of the engines passed they were about thirty feet east of the baggage room. Fred Shaw, engineer on the switch engine, testified that the engines passed about sixty feet east of the baggage room. The work-train was going about four miles per hour. The bell on the road engine was ringing. He helped to take appellee's foot from the track where it was wedged in, ninety-two feet from Fourteenth street. There was no night when they did not stop at Thirteenth street, and they always came to a full stop at the depot. August Sandberg, employed by appellant at Silvis, and on the work-train at the time of the accident, testified that the train always stopped at Moline. He judged it was going four or five miles

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per hour at the time of the accident. Frank Strong, switchman in charge of the train crew on the work-train, testified that the road engine had an electric head light, and that he saw appellee's legs wedged in next the rail about eighty-five feet from the east end of the baggage room. He did not hear the whistle or bell on the road engine. Oscar E. Samuels, employed by appellant at Silvis, and on the work-train at the time of the accident, testified that it was the custom to come to a full stop at Moline. The road engine had a bright light and the work-train was going about three or four miles per hour. It always came to a full stop at the depot at Moline whether the men got off or not. He judged the road engine was going not over four miles per hour, and he did not hear the bell or the whistle. Henry Glick, switchman on the train crew of the work-train at the time of the accident, testified that the work-train stopped east of the depot. The road engine had an electric head light and was not going more than four or five miles per hour. The work train passed the road engine east of the depot seventy-five or eighty feet, and always came to a full stop at Moline. The men were in the habit of getting off before the train stopped every night and he had warned them not to do this. Appellee testified in rebuttal that he never was warned and never heard any such warning given.

There is no evidence tending to establish the averment that appellant compelled appellee to alight from the work train before it stopped. There is some evidence tending to show that when appellee alighted from the work train it had stopped and was opposite the depot platform, but the preponderance of the evidence seems to be that it had not stopped but was running slowly and was still east of the depot building. It will be observed that the evidence is in great conflict as to whether the road engine was running slowly or rapidly, under or above the rate of speed prescribed by the ordinance, and as to whether its bell was continuously

ringing as the engine approached and passed the work-train. In fact the evidence is sharply conflicting upon every averment of negligence contained in appellee's declaration on which there is any proof whatever, and also as to whether the acts of appellee indicated due care on his part. While it is true that it was the province of the jury to determine such conflict, and the duty of the court to give their verdict due and careful consideration, yet when it is apparent that their verdict may have been brought about by some error of law on the part of the court or by passion, bias or prejudice on the part of the jury, it is equally the duty of the court to set aside the judgment.

In view of the fact that this judgment must be reversed and the cause submitted to another jury, we refrain from expressing any opinion on these disputed facts in this record.

Complaint is made of appellee's fourth instruction which reads as follows:

"The jury are instructed that the weight of the testimony does not necessarily depend on the greater number of witnesses sworn on either side of the question in dispute, but you are at liberty as jurors, to consider all the facts and circumstances appearing from the evidence in the case, and determine from that, which of the witnesses are worthy of the greater credit."

This instruction admitted the element of numbers which should have been considered by the jury with all the other elements that are mentioned in the instruction. *Gage v. Eddy*, 179 Ill. 492. In *Chicago Union Traction Company v. Hampe*, 228 Ill. 346, the court in passing on an instruction that enumerated the various matters to be considered by the jury, omitting, however, any reference to the number of witnesses testifying pro and con, said, "it omitted one very important element and for that reason should have been refused." In *E. J. & E. Ry. Co. v. Lawler*, 229 Ill. 621, the court in passing on an instruction containing the following words, "The jury are instructed that the pre-

ponderance of evidence in a case is not necessarily alone determined by the number of witnesses testifying to a particular fact or state of facts," said, "The element of numbers should be considered by them with all the other things which are mentioned in the instruction. * * * We do not think that this court has given its unqualified approval to this instruction, or that it might not be misleading in a case where the question of numbers was important and no other instruction given supplementing it." In this case, the instruction complained of was not supplemental, and the number of witnesses testifying on some of the issues involved may have been material.

It is urged that appellee's seventh instruction was erroneous. We have examined this assignment of error and cannot see that there was any prejudicial error in the ruling of the court in the respect complained of.

Appellant urges that the verdict for \$25,000 can only be accounted for on the grounds of prejudice, passion or misconception on the part of the jury and that the *remittitur* of \$9,000 does not remove the prejudice, passion or misconception and argues that these elements may have entered and probably did, into the finding of facts, if not the issues themselves. The trial court recognized the fact that the damages as found by the jury were excessive and appellee conceded that they were and entered the *remittitur*. While it must be said that by the law as settled it is in the power of the trial court to enter judgment on verdicts, as the one under consideration was, to an amount satisfactory to the trial judge, and the entering of such judgment is not error, yet the judgment is anomalous and in a reviewing court cannot be entitled to the presumption of a fair verdict which results from concurrence upon all the issues by the jury and the court. *C. & N. W. Ry. Co. v. Cummings*, 20 Ill. App. 333. In the exercise of the revisory power of this court, we may reverse a judgment rendered under such circumstances as appear in the record in the absence of errors of law,

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where in our opinion such course would best tend to promote the impartial administration of justice.

In view of the conflict in the evidence, the error indicated in appellee's fourth instruction, and the impeachment of the verdict by the trial judge in compelling a *remittitur* of thirty-six per cent. of the verdict, in which appellee concurred, the rights of the parties should be submitted to the consideration of another jury.

The judgment is therefore reversed and the cause remanded.

Reversed and remanded.

Mr. Justice DIBELL, dissenting.

I am of opinion that this judgment should be affirmed.

Charles Wertz et al., v. Appellees, v. Alice Mulloy,
Appellant.

Gen. No. 4,954.

1. MECHANIC'S LIENS—*section 1 of act of 1903 construed.* The words "authorized or knowingly permitted" contained in section 1 of the act of 1903 apply notwithstanding the person who contracted for the improvement had an interest in the property improved.

2. MECHANIC'S LIENS—*"knowingly permitted" defined.* One knowingly permits a thing to be done who, knowing that it is to be done, and being present when he can object, and who has an interest to object, does not object.

3. MECHANIC'S LIENS—*against whom relief cannot be granted.* A lien cannot be decreed against the interest of a party in land sought to be subjected if no allegations have been made against such party.

4. MECHANIC'S LIEN—*what decree in favor of sub-contractors should provide.* Under ordinary conditions the balance due the original contractor after payment of the preferred claims of laborers should be divided by decree *pro rata* among those who furnished material, but *held*, under the special facts of this case, that

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the award to the subcontractors, whose status under the evidence was practically that of an original contractor, should be extended beyond the sum due the original contractor and should be in full of all of the claims of such subcontractors.

5. APPEALS AND ERRORS—*upon what error cannot be assigned.* A question not raised in the trial court by the pleadings or otherwise cannot be first raised on review.

Mechanic's lien. Appeal from the Circuit Court of Kankakee county; the Hon. FRANK L. HOOPER, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed April 22, 1908. Rehearing denied October 13, 1908.

A. L. GRANGER, for appellant.

EBEN B. GOWER and SMITH & MARCOTTE, for appellees.

MR. JUSTICE DIBELL delivered the opinion of the court.

In September, 1903, Mrs. Athenaiss Mulloy, a widow, lived in a house upon a lot in an addition to the city of Kankakee with her daughter Alice Mulloy, and with the six children of a deceased daughter-in-law. Mrs. Mulloy was then between sixty-three and sixty-four years of age and Alice was thirty-six years of age. Another daughter, Mary Mulloy, was a teacher in Chicago, and considered this place her home. On September 23, 1903, Mrs. Mulloy entered into a written contract with W. P. McHatton, by which the latter was to remodel said house and build a new addition thereto, according to plans and specifications, for \$1,125, upon which Mrs. Mulloy was to pay 85% of the amount of labor and material on the ground as often as every two weeks, and the rest when the building was complete and accepted and proof made that no liens or claims stood against the building. The contract described Mrs. Mulloy as owner. The signatures thereto appear as follows:

“W. P. MCHATTON. [SEAL.]

ATHENAISS MULLOY. [SEAL.]

In the presence of ALICE MULLOY. [SEAL.]”

McHatton began the work soon thereafter, and about October 15 the family removed to another house in order to permit the work to proceed. Mrs. Mulloy was last out of her house on November 19, 1903. By Thanksgiving day she was seriously ill. By or before January, 1904, her physicians had forbidden that any one be allowed to see her. She died on February 28, 1904. In May, 1904, the building had reached such a condition that it could again be inhabited, and Alice Mulloy then moved back into it with the grandchildren. The work was completed in June, 1904. The long continuation of the work is not directly explained in the evidence, but the proof shows that Mrs. Mulloy personally and by the hand of Alice paid McHatton \$100 on October 17, \$300 on October 31, and \$125 in December, all in 1903; and that nothing further was ever paid upon the contract, except that after this suit was begun Alice paid a small bill to one party who furnished hardware for the building. It is a fair inference from the proofs that this delay in payment delayed the completion of the building.

In fact, Mrs. Mulloy was not the owner in fee of the premises. She owned a life estate in these premises and also in a farm in Iroquois county. The remainder in this lot was in her daughters, Alice and Mary. In certain questions and answers it is implied that this was under the will of her deceased husband. Mrs. Mulloy left a will giving all her property to Alice and Mary, and appointing Alice executrix, and that will was duly probated. Alice introduced proofs in this case tending to show that this state of the title was fully made known by Mrs. Mulloy to McHatton. The testimony introduced by the lienors tends to show that all McHatton was given to understand by Mrs. Mulloy was that the property would go to Alice and Mary after her death, leaving him to suppose that she was the owner and intended to will it to them. The cross-examination and a later examination of the witnesses

for Alice Mulloy tended to show that the statement made to McHatton was as indefinite as he claims.

Charles Wertz furnished lumber used in this building. Walter H. Smith was a stone mason and furnished brick, stone and mortar, and did work on the foundations and plastered the building. John Paulissen furnished mill work for the building, such as doors and door frames, window and window frames, etc., all after Mrs. Mulloy's death. McHatton paid to Wertz \$100 of the money he received from Mrs. Mulloy. Nothing further has been paid to these subcontractors and material men. On August 24, 1904, Wertz filed his bill against McHatton, Paulissen, Walter H. Smith and Alice Mulloy personally and as executrix for a subcontractor's lien for the amount due him. This bill was based on the theory that Mrs. Mulloy was the owner when the contract was made, and that these premises passed to Alice by Mrs. Mulloy's will. Alice answered, setting up that Mrs. Mulloy was only a life tenant, and that the remainder was in Alice and Mary. Wertz then filed an amended bill, to which Mary also was named as defendant. Mary does not seem to have been served with summons but she and Alice filed demurrers to said amended bill, which were sustained. Afterwards Wertz filed a second amended bill, which set up correctly the title, and sought to charge Alice by virtue of her conduct as hereinafter stated. Alice answered. Smith and Paulissen each filed his combined answer and cross bill, seeking a decree for the amount due him. Proofs were taken and reported by a master, and further proofs were heard before the court, and there was a decree in favor of Wertz, Smith and Paulissen, respectively, against the undivided one-half interest of Alice Mulloy in this property. She appeals from that decree.

There was a sharp dispute as to the facts. We have carefully read not only the evidence in the abstract, but also the evidence in the record, from which latter we gained a much more complete understanding of the

controverted questions than from the abstract. The proof introduced by appellees tended strongly to show that Alice participated with her mother in all the interviews and discussions with McHatton which preceded the preparation of the written contract; that she signed it in the manner above indicated for the purpose of being a witness to its execution; that after her mother's illness began she took practical charge of directing the work; that both before and after her mother's death she caused many radical and important changes to be made from what the plans and specifications required, and that she repeatedly promised Wertz and Smith to pay them for their work and materials upon the building and that she secured the completion of the work and the furnishing of the materials by her express and repeated promises to pay; that Paulissen made no contract with McHatton for the mill work, but that it was ordered directly by Alice from Paulissen, and furnished by him to the building or to McHatton upon her orders and upon her express promise to pay him therefor. Appellant denied many of these orders for changes; denied that the changes were so important and extensive as appellees claimed; and denied that she had ever promised to pay any of the claimants; and she also set up various slight defects in the work; and she denied that she contracted with Paulissen or ordered the mill work from him. It is not reasonable to suppose that after Mrs. Mulloy's serious illness, and after her death, these men would have continued to furnish labor and material and would have finished the building without any pay and without any assurances of pay from any one. Upon reading all the evidence upon these subjects in the record, we cannot say that the trial court decided these contentions erroneously and should have found the other way.

Section one of the act of 1903 in relation to mechanic's liens gives a lien to any one whom the owner of a lot "has authorized or knowingly permitted to

contract for the improvement of or to improve the same, furnish material, fixtures," etc., for the improvement of such lot. The act of 1895 contained a similar provision. It is contended by appellant that the words "authorized or knowingly permitted" should not be applied to a case where the person who contracted to have the improvement made had some interest or estate in the lot upon which the improvement was to be made; and that as Mrs. Mulloy had a life estate in the property, the lien should have been confined to her life estate. To so hold would be to disregard the natural meaning of the words of the statute, and would practically defeat the statute. Even under former lien laws, it was possible for the owner to pursue such a course of conduct as to estop him from defeating a lien for an improvement put upon his premises by another. The present statute and the act of 1895 were intended to go further. He knowingly permits a thing to be done who, knowing that it is being done, and being present where he can object, and who has an interest to object, does not object; and still more has he knowingly permitted it to be done if he takes part in doing it. This statute and the prior act of 1895 seem to have been so construed in *Carey-Lombard Lumber Co. v. Jones*, 187 Ill. 203; *McCarthy v. Miller*, 122 Ill. App. 299; *Hughes v. McCasland*, 122 Ill. App. 365. In *Com. v. Curtis*, 9 Allen 266, the word "permit" was held to mean "to allow by not prohibiting." We are of opinion that Alice Mulloy knowingly permitted this contract to be made and this labor and material to be expended upon this lot of which she owned an undivided one-half in remainder, even under her own testimony, and much more so under the testimony introduced by appellees; and that appellees were entitled to a lien upon her interest in the land. The defects in performance, which she sought to prove, were very slight, were partly attributable to her own conduct, and were amply covered by the deductions made by the court below, evidently for that purpose.

Appellant contends that if the estate in remainder is subject to any liens for these improvements, then those liens should have been enforced against the interest of Mary Mulloy as well as of appellant. Mary was never summoned. She was named a defendant in the first amended bill, and the attorneys for Alice filed a demurrer to said bill for Mary also, and that demurrer was sustained. Mary was also named as a defendant in the second amended bill. She did not answer it and no notice seems to have been afterwards taken of her as a party, and she was never afterwards named as a party in the title of the cause upon the docket. She was not named as a party in the cross bills. No facts were stated in the second amended bill or in the cross bills which would have entitled appellees to any lien against Mary's interest. Alice did not in her answer state any facts which would make the interest of Mary liable with her interest. She did not raise this question in the court below. We are of opinion that she should not be permitted to raise it for the first time in this court; but, waiving that, we conclude no error was committed. As already said, there was no allegation against Mary that would have supported a decree against her interest. The proofs were very meagre to charge her interest. She was present at home when her mother had the first interview with McHatton, in which her mother discussed different methods of repairing the house but came to no conclusion. Mary then returned to her school in Chicago. She came home at Thanksgiving, and seems to have remained at home till January on account of her mother's serious illness. The family were then living five or more blocks from this house, and Mary is not shown to have known what was being done or to have participated in it, except that she went once to Paulissen's mill with Alice when Alice was considering what style of door to adopt, and this seems to have been in April, though Alice and Mary testified it was in December or January. Mary was home at her mother's funeral, and

stayed several days while her sister, Alice, was ill and confined to the house. It is obvious that it would be difficult to support a decree against Mary's interest upon this proof. The liability of the interest of Alice to the liens rests upon substantial and unassailable grounds under this statute. We are of opinion appellees were not required to imperil their decrees for liens by taking it against Mary's interest. It is urged that under this decree Alice will lose her home, and Mary will reap the benefits and that Alice cannot compel Mary to contribute. Not only did the same attorneys appear for Mary who appear for Alice, but Mary is the sole surety for Alice upon her appeal bond of \$2,000 securing the payment of these liens in this case, and the sisters are evidently acting in entire harmony in resisting the decree. It must be assumed that Alice considered whether Mary would contribute or could be compelled to contribute, before she knowingly permitted this contract to be entered into and actively participated in making the improvement. The amount required to be paid by this decree, excluding interest, added to the amount already paid, only makes \$1,693.35, while the proof shows it has cost McHatton and the others \$2,333.55, excluding interest, and that it cannot be reproduced for less money. In other words, as McHatton shows, he entirely underestimated the work required to repair and renew this old building, and he took the contract at too low a figure, and there is a loss to those who have done the work and furnished the materials of about \$640 when this decree is satisfied.

McHatton testified that he had furnished extras to the amount of \$436. The correctness of this is disputed, and there is some uncertainty to a small amount in the items entering into that sum, but upon a careful examination of the whole record we are satisfied that that amount is substantially correct. There was proof of slight defects in foundation and cistern and plaster, and of the cost of repairing these; of a failure to fur-

nish one screen down stairs, and four screens for the attic, and it was a disputed point whether the specifications called for screens over openings in the attic; and there was proof authorizing a slight deduction for a difference in the kind of lumber used in the hall floor. Because of these matters the court below reduced the allowance for extras to \$383.75, making the contract price and extras amount to \$1,508.75, and we conclude appellant cannot justly complain of that allowance. Deducting the \$525 paid from that total, left \$983.75, which the court found was due McHatton at the completion of the entire contract on June 13, 1904, and upon which the court allowed interest at 5% per annum to the date of the decree. It is argued that as the contract provided that the last 15% of the contract price should be paid when proof was made that no liens or claims stood against the building, and as there are liens against the building, the court should have allowed interest to the date of the decree on only 85% of the amount found due. But the contract required 85% of the labor and material on the ground to be paid as often as every two weeks. That contract was broken. No payment was made after December, 1903. The owner was very much in arrears long before the work was completed. It is evident there would have been no liens if the owner had kept that agreement. The claims for liens and this law suit arise from the failure of the owner to pay as agreed. Under such circumstances, we conclude that this decree as to interest is equitable and proper.

The \$525 was paid without requiring the contractor to furnish the statement under oath, which it was the duty of the owner to obtain before paying money to the contractor, under section 5 of the lien law. But McHatton paid \$425 of this for labor, and under sections 26 and 27 of that act the wages of laborers constitute a claim which is preferred to the claims of subcontractors and material men. Therefore if such statement had been required and furnished, the \$425

must still have been paid to the laborers, and as to that sum the subcontractors were not injured by the failure of the owner to require such a statement. The remaining \$100 which McHatton received from the owner he paid to Wertz, and it reduced Wertz's bill by that amount. This was an injury to Smith, and the court adjusted that by the decree, and allowed a lien in favor of Smith for his *pro rata* share of said \$100.

The decree found that there was due Wertz from McHatton \$559.01, and that he was entitled to interest thereon at 5% per annum from May 10, 1904, when he completed his subcontract, to the date of the decree; that there was due Smith from McHatton \$492.80, and that he was entitled to interest thereon at the same rate from June 9, 1904, when he completed his subcontract, to the date of the decree; and found that Wertz and Smith should share *pro rata* in said balance of \$983.75 and the interest thereon to the date of the decree due from the owner to McHatton, and have liens therefor on the interest of appellant; and fixed the sums to which they were entitled to a lien at the date of the decree at \$601.75 for Wertz and \$528.40 for Smith, besides \$36.15 additional to Smith for his *pro rata* share of said \$100 improperly paid to McHatton. The decree found that Paulissen was an original contractor with appellant as to materials furnished by him, and that he finished furnishing materials on May 18, 1904, and that there was due him \$184.60 therefor, with interest from that date to the date of the decree, and that the principal and interest amounted to \$212.03; and the decree gave him a lien therefor on the interest of appellant. It will be observed that by this decree the balance due to McHatton for the contract price and for extras is divided between Wertz and Smith, and that as to them appellant's interest in the property is only made liable for what McHatton is entitled to enforce against the property; but that the amount awarded to Paulissen is outside of and beyond the contract price and extras. The correctness of this

feature of the decree is the only question which we have found it difficult to solve.

McHatton and Paulissen each testified that they did not contract with each other concerning the material which Paulissen furnished, but that appellant dealt directly with Paulissen in that matter. They testified that appellant and Mary and McHatton went together to Paulissen's the first time, and appellant selected the style of some doors, but that McHatton did not contract for nor order the material. The proof shows that afterwards appellant telephoned to Paulissen, giving orders for material for the house; that sometimes McHatton's men at the house telephoned to Paulissen for material that was needed; that part of the material furnished by Paulissen was sent directly to the house and part of it was sent first to McHatton's shop. Paulissen testified that appellant expressly promised to pay him for this material. Appellant testified, denying such promise, but afterwards qualified her denial by saying she did not remember so promising. The court found these issues for Paulissen and that he was an original contractor with appellant. But the testimony that Paulissen contracted directly with appellant is somewhat weakened by the fact that he charged the goods to McHatton on his books; that one of the exhibits attached to his answer and cross bill is an alleged notice which recites that he had been employed by McHatton to furnish him the necessary mill work for this improvement; that another of his exhibits, entitled "Statement of claim for lien," recites a verbal contract with McHatton to furnish such mill work, and that he did furnish it at the special instance and request of McHatton. The answer and cross bill of Paulissen, however, did not aver a contract between McHatton and Paulissen, but a contract directly between appellant and Paulissen, and that Paulissen furnished the material directly upon appellant's orders. It is contended by appellant that Paulissen was a subcontractor only, and did not give

the necessary notice within the time fixed by law therefor, and because of that failure had no lien. We are satisfied that appellant was present when the original order was given, and selected the styles she wished, and either gave the order or joined with McHatton in giving it, and afterwards ordered material directly from Paulissen, and that she so dealt directly with him that she cannot now complain of any delay in furnishing the subcontractor's notice required by statute; and that the statement of his account which he furnished her a few days after he finished delivering materials, and which she accepted without objection, and which truly stated the condition of his account, does not permit her to now defeat his claim for a lien by alleging non-compliance with the subcontractor's duty to give notice, etc. But the material he furnished was to a greater or less extent a part of what McHatton contracted to furnish, and the serious question is whether the decree should have divided the amount remaining due to McHatton among Wertz, Smith and Paulissen, instead of dividing that balance between Wertz and Smith, and requiring Paulissen to be paid outside that sum. We conclude that under ordinary conditions the balance due the original contractor after payment of the preferred claims of laborers, should be divided *pro rata* among those who furnished material, and that the lien upon the premises should not be extended beyond the sum due the original contractor for the contract price and extras.

But this proof presents an unusual case. Although Mrs. Mulloy said she was improving this house "for the girls," meaning Alice and Mary, yet she refused to put into the plans and specifications some things which appellant wanted done. Soon thereafter Mrs. Mulloy was taken seriously and fatally ill. She soon ceased to be able to give directions. Appellant then took the entire direction of the improvement into her own hands. There is nothing indicating that there was any further substantial reference to the contract or to the plans

and specifications. When appellant saw some work finished, or partly so, and concluded she would like it different, or that it would look better built wider or longer or of better material or finish, she ordered the change, and it was made. We are satisfied that Wertz and Smith came to her repeatedly after her mother's disability, and both before and after her mother's death, desiring money, and especially desiring to know where their money was to come from if they went on furnishing material and doing work; and that she did not refer them to McHatton or say that she would pay him the contract price, but that she treated it as a matter between herself and Wertz and Smith, respectively, and expressly promised to pay their bills if they would go on and finish the work; and that she did this repeatedly, and thereby procured the completion of the improvement as she wanted it done, and without further special reference to the original contract or to the plans and specifications. When she asked Smith when he was going to plaster, and he replied that he wanted some money before he plastered, she told him there would be no trouble about the money, that she was going to pay all those bills, but no more money to McHatton. Paulissen furnished nothing till the second month after Mrs. Mulloy died. He had appellant's express promise to pay. Under these circumstances we conclude that she could not justly complain if Wertz, Smith and Paulissen were each given a lien for all that is due them. Wertz and Smith have not questioned the decree in giving them slightly less than the full amount of their bills. The errors alleged by appellant are not well assigned. The decree is therefore affirmed.

Affirmed.

Harry L. Fordham, Appellant, v. William C. Thompson, County Clerk, et al., Appellees.**Gen. No. 5,040.**

1. COUNTIES—*power to appropriate in aid of hospital.* A county by virtue of statute is authorized to appropriate money to aid a non-sectarian public hospital for the sick and infirm located within its limits.

2. HOSPITALS—*what does not discharge public character of.* A hospital is not prevented from being of a public character by the fact that those patients received by it who are able to pay are required to do so, or that it receives contributions from outside sources, so long as all the money it receives is devoted to the general purposes of charity, and none of it goes to the benefit of any private individual or corporation organized for profit.

3. INJUNCTIONS—*when solicitor's fees awarded upon dissolution will be sustained.* An allowance of solicitor's fees by way of damages upon the dissolution of an injunction will be sustained where they have been shown to be reasonable and the usual and customary charges for such services as were rendered. It is however better practice to show what contract, if any, was made with respect to the rendition of such services.

4. INJUNCTIONS—*when award of solicitor's fees in favor of county will be sustained.* Upon dissolution of an injunction an award of solicitor's fees in favor of a county against whom the injunction ran, will be sustained, notwithstanding the attorney engaged to obtain the dissolution was not the state's attorney whose duty it might have been to represent the interests of the county, it not appearing from the record for what reason the state's attorney did not represent the county.

Bill in equity. Appeal from the Circuit Court of Lee county; the Hon. RICHARD S. FARRAND, Judge, presiding. Heard in this court at the April term, 1908. Affirmed. Opinion filed August 10, 1908. Rehearing denied October 13, 1908.

Statement by the Court. The city of Dixon was incorporated under an act found in the private laws of 1859, on page 135, which in section 9 of article 8 is declared to be a public act. Section 4 of article 5, prescribes the powers of the city council and among these are to appropriate money and provide for the payment of the debts and expenses of the city; to

make regulations to prevent the introduction of contagious diseases into the city; to establish a hospital and make regulations for the government of the same; to make regulations to secure the general health of the inhabitants; and to make all ordinances which shall be necessary to carry into execution the powers specified in the act.

On November 1, 1895, and while, as we understand it, the city of Dixon was still acting under said special charter, its city council adopted an ordinance entitled "An ordinance establishing a public hospital in the city of Dixon, Illinois, and regulating the control thereof." The first section provided "that there be established and maintained by the city of Dixon, Illinois, in said city, a public hospital for the use and benefit of the inhabitants of said city," upon certain described real estate. The second section authorized the mayor, with the approval of the city council, to appoint a board of nine women directors of said hospital, chosen with reference to their fitness for such office. Section 3 fixed the terms of office of said directors, provided for filling their places by appointment as before when they retired, and for the removal by the mayor, with the consent of the city council, of any director for misconduct or neglect of duty. Section 4 provided for filling vacancies in like manner, and that no director should receive compensation for services. Section 5 provided how the directors should elect their officers and adopt regulations for the government of the hospital, and that they should have exclusive control of the management of the hospital. Section 6 is as follows: "Any person desiring to make donations of money, personal property or real estate for the benefit of such hospital shall have the right to vest the title of the money or real estate, so donated, in the board of directors created under this ordinance, to be held and controlled by such board, when accepted, according to the terms of the deed, gift, devise or bequest of such property; and as to such property the said

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board shall be held and considered to be special trustees."

By an undated deed, acknowledged on May 26, 1896, Solomon H. Bethea conveyed to nine women, described as the board of directors appointed on November 1, 1895, by the city council of the city of Dixon, as provided by said ordinance, certain real estate (being the same real estate which had been described in section one of said ordinance), "to have and to hold the same in trust solely and exclusively for the uses and purposes of a public hospital, subject to the following conditions and limitations only." Here followed many provisions. Among them are that the board of directors should have exclusive control and management of the hospital, except as to money appropriated for the hospital by the city of Dixon, which appropriation they should expend under the direction of the city council; that the directors should at least once a year report to the city council, all their acts and show all moneys received by them or expended; and such report, so far as the the moneys appropriated by the city council were concerned, should be approved by it; that so long as the city council contributed at least \$500 per year for the purposes of the hospital, if called upon therefor, the mayor, with the aproval of the city council, should appoint directors to fill vacancies occurring on the board, and that if in any year the city council did not make such appropriation when called upon to do so by the board of directors, the mayor and city council should forfeit the right to fill the vacancies, and the circuit court of Lee county, upon a bill in chancery filed for that purpose by not less than ten citizens of the city of Dixon, should fill the vacancy. The deed further provided that the directors should forever be chosen from the women of Dixon; that no physician should ever be a director; that the directors should serve without compensation; that no funds of the hospital should ever be used directly or indirectly to compensate any director for services rendered; and

that neither the property conveyed by that deed nor any funds of the hospital should be used for any purpose of gain or profit, except such gain or profit as shall be again used for the purpose of the hospital. It provided that the directors should have the right to accept donations of money, personal property and real estate for the use and benefit of the hospital, and to hold and control the same according to the terms of the deed or gift; and that, if necessary, the board of directors might by unanimous consent of all its members, convey the property covered by that deed, provided the proceeds should be invested in other property to be used for the same purposes and conducted in the same manner forever.

The ninth clause of the deed read as follows: "There shall never be any discrimination, either in the choosing of directors or in the admission of patients, or in the selection of employes, on account of religion, nationality or politics, nor in the employing of physicians shall there be any discrimination between the different schools of medicine."

The act of 1889 (Hurd's Statutes 1905, page 261) provided: "That it shall be lawful for any county or any city of this state to contribute such sum or sums of money towards the support of any non-sectarian public hospital for the sick or infirm, located within its limits, as the county board of the county, or city council of the city shall deem discreet and proper."

On September 12, 1907, the board of supervisors of Lee county adopted a resolution appropriating \$250 to the Dixon Public Hospital, "providing said hospital board of trustees agree to furnish the care, board and attendance of a nurse for all paupers in Lee county sent to said hospital for \$1 per day."

On September 16, 1907, appellant, a member of said board of supervisors who voted against said appropriation, filed a bill in equity against the county clerk and the county treasurer of said county, appellees herein, to enjoin them from paying said \$250 to said Dixon

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Public Hospital, on the ground, stated in said bill, that there was no authority of law for said appropriation. An injunction was ordered without notice, and was served. Appellees filed an answer asserting that said appropriation was authorized by law, and setting up and relying upon the statute above quoted, and also that the actual expense of furnishing care, board and attendance of a nurse for a pauper, or for any other person, at said hospital greatly exceeds \$1 per day; that the directors of the hospital agreed with the board of supervisors to furnish such services for the paupers of Lee county at said hospital for \$1 per day, and that such contract is a great financial advantage to Lee county and its taxpayers, and that said contract and the appropriation were lawful and proper. Appellees entered their motion to dissolve the injunction and the same was heard upon affidavits and documentary evidence. There is some conflict on the question of fact in the affidavits, but in those respects the affidavits presented by appellees were by persons who best knew what the facts were. The court dissolved the injunction and dismissed the bill. Appellees filed a suggestion of damage upon the dissolution of the injunction, and were allowed \$100 for their solicitor's fees in procuring the dissolution of the injunction and \$7 for the costs of procuring certified copies of certain documents. This is an appeal by complainant below from that decree.

JOHN P. DEVINE and BROOKS & BROOKS, for appellant.

HENRY S. DIXON, GEORGE C. DIXON and A. C. BARDWELL, for appellees.

MR. JUSTICE DIBELL delivered the opinion of the court.

1. We hold that, under the proofs, this is a non-sectarian public hospital for the sick or infirm, located within the limits of Lee county and for the support

of which its board could contribute a sum of money, under *Sisters of St. Francis v. Board of Review*, 231 Ill. 317, *Board of Review v. Chicago Polyclinic*, 233 Ill. 268, and *County of Hennepin v. Brotherhood of Gethsemane*, 27 Minn. 460. It is not prevented from being a public hospital by the fact that those patients received by it who are able to pay are required to do so, or that it received contributions from outside sources, so long as all the money it receives is devoted to the general purposes of charity, and none of it goes to the benefit of any private individual or corporation organized for profit. There was no private gain to any person connected with the institution. No obstacle was placed in the way of those who needed treatment, for which they were not able to pay, in obtaining admission to the hospital and the benefit of its appliances and the services of its nurses. The word "public" applied to property may either mean the character in which it is held or the uses to which it is applied. The proof shows that up to the time this cause was heard, this property had been held and controlled by trustees appointed by the mayor and city council of the city of Dixon, that the city had annually paid \$500 to the hospital, and the hospital had annually made a report to the city of its receipts and disbursements. Its property is therefore held and its affairs are controlled by trustees appointed by a public municipal corporation, having statutory authority to establish it, and it reports its receipts and disbursements to the municipality. As the municipality appoints and controls the directors, and may remove directors for misconduct and fill the vacancies thus created, it controls the hospital in a certain sense through the directors of its appointment. This seems to us to make it a public hospital in the fullest sense. We do not think it is deprived of the character of a public hospital because the deed from Bethea provides that if the city ceases to contribute, the appointment of the trustees shall be made by the circuit court sitting in

chancery, upon a bill to be then filed for that purpose. Bethea did not reserve to himself or to his heirs or assigns the right to nominate directors or to control the hospital. It would not cease to be a public hospital if the circuit court, in chancery, should be called upon to appoint its directors or administer its affairs. The court of equity is as truly a branch of the government as is the city council, and the protection and administration of charities is within the scope of its powers when such intervention becomes necessary to protect public interests.

2. The uses of this hospital are public. Though those who are able to pay are charged, yet it is established and conducted without a view to profit, and without any chance for any one to make a profit out of its receipts. It is obviously operated at a loss, made up in whole or in part by the contributions of the city and the county, and it is operated solely for the public good and for the promotion of the health of the public.

3. The action of the board may also be sustained on the ground of contract. Though paupers should be kept at the poor-house, yet that is not necessarily true of paupers who need the nursing and appliances which can only be obtained in a hospital. If the county has in its charge paupers who need such treatment, no one would doubt its power to furnish necessary nurses and hospital appliances at the poor-house. But it might be much cheaper to employ the services and appliances of a hospital already established, especially if the needs of the county in that respect would be only occasional and spasmodic. This contribution of \$250 by the county board was upon condition that the hospital would furnish the care, board and attendance of a nurse for all paupers in Lee county sent to said hospital for \$1 per day. The proof showed that such services were worth much more than \$1 per day. There is nothing to show how many such pauper patients the county was likely to have or usually had in the course

of a year; and for aught that appears, this appropriation may really have been an advantageous business arrangement for the county to make and not really a donation at all. Under the proof the court properly dissolved the injunction.

4. Upon a suggestion of damages filed by defendants, it was shown that defendants hired two solicitors who appeared for them, prepared and filed their answer and a number of affidavits, procured certain certified copies of documents used as proofs on the hearing of the motion to dissolve, at a cost of \$7.50, presented the proofs and argued the motion to dissolve and charged defendants \$100 for their services, and that they had not been paid. They also proved that that was a reasonable, usual and customary fee for such services in that county. The court allowed \$107. We should be better satisfied if it had been shown whether there was any express contract between appellees and their solicitors as to the amount to be paid to the solicitors for procuring the dissolution of the injunction, for there could be no recovery for a larger sum than appellees had agreed to pay, if there was an agreement. But we conclude that the proof that the solicitors had charged them \$100 and that that was a reasonable, usual and customary fee for the service, and had not been paid, is sufficient *prima facie* to charge appellant with that amount, under *Marks v. Columbian Yacht Club*, 219 Ill. 417, and *Fry v. Radzinski*, 219 Ill. 526, in which cases proof similar to that here introduced was held to justify an allowance for solicitor's fees.

5. But it is argued that it was the duty of the state's attorney to defend this action, and that he could not have been allowed a solicitor's fee, and that appellees had no right to employ other solicitors and thereby create a charge against appellant. We do not decide whether the duty of the state's attorney required him to defend, nor whether, if he had done so, appellant would have escaped payment of the solici-

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tor's fees necessarily incurred in procuring the dissolution of the injunction. The state's attorney did not defend. There was no proof that he could have done so. He may have been ill or absent or interested in sustaining the injunction.

We do not think that the unsuccessful appellant can resist an allowance for appellees' solicitors' fees in such a case by merely saying that there was an attorney who perhaps could have been compelled to act for appellees without compensation. The law awards against appellant a reasonable fee for the solicitors who did procure the dissolution of the injunction.

The decree is affirmed.

'Affirmed.

**Western Cottage Piano & Organ Company, Appellee,
v. Thomas W. Burrows et al., Appellants.**

Gen. Nos. 4,988, 4,989.

1. CORPORATIONS—*when directors' meeting lawful.* If all the directors are present and participate the meeting is lawful and general business of the corporation may be transacted.

2. CORPORATIONS—*effect of failure to elect successors to directors.* If successors to directors whose terms have expired are not chosen, the old directors continue in office.

3. CORPORATIONS—*what majority of directors controls.* At properly called meetings of directors a majority of the number present controls, if a majority of the board is present, and a majority carries any propositions submitted to vote, unless some statute or by-law requires more than a majority.

4. CORPORATIONS—*when directors authorized to fix salaries.* Where the by-laws of a corporation require that the salaries of officers shall be fixed annually by the resolution of the board of directors, a hold-over board is authorized by resolution to carry out such by-law.

5. CORPORATIONS—*when board of directors may elect officers.* A hold-over board of directors has power to elect officers for the ensuing corporate year.

6. CORPORATIONS—*when stockholders' meeting adjourned.* When

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all stockholders have left the room and the story of the building in which the stockholders' meeting had been held, such meeting is deemed to have been adjourned and abandoned, even though the motion to adjourn was irregularly put to vote and was not lawfully adopted.

7. CORPORATIONS—*how stock should be voted to organize stockholders' meetings.* Voting to organize stockholders' meetings should be by shares of stock.

8. CORPORATIONS—*when stockholders' meeting illegal.* Where there is an absence of good faith and an adjourned meeting of stockholders is held in such a way as to prevent certain of the stockholders from knowing of it, the proceedings are invalid.

9. CORPORATIONS—*when equity will determine title to office.* If the title to an office in a private corporation is the only matter involved equity will not take jurisdiction, but where the title to such an office is necessarily involved in a cause properly before a court of equity, jurisdiction will be assumed and the matter of title settled.

10. INJUNCTIONS—*when lie to maintain status of corporate officers.* An injunction will lie to restrain interference by pretended officers of a corporation with the legal officers thereof where it appears that such pretended officers are pursuing a course of conduct calculated to destroy the financial standing of the corporation and are insolvent and incapable of compensating the corporation in damages.

11. INJUNCTIONS—*upon what issued.* As a general rule an injunction will only lie upon a bill or cross-bill, but where a court of equity is already in possession of a cause and has jurisdiction of both the subject-matter and of the parties, it may enforce obedience to its mandates by an injunction issued merely upon a petition in the cause, without the filing of a bill.

Bill for injunction. Appeal from the Circuit Court of LaSalle county; the Hon. EDGAR ELDREDGE, Judge, presiding. Heard in this court at the April term, 1908. Affirmed. Opinion filed August 10, 1908. Rehearing denied October 14, 1908, and additional opinion filed.

EDDY, HALEY & WETTEN, and BUTTERS, ARMSTRONG & FERGUSON, for appellants; P. C. HALEY, of counsel.

DUNCAN, DOYLE & O'CONOR, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

On January 9, 1908, the Western Cottage Piano & Or-

gan Company, hereinafter called the company, filed its bill in equity against Thomas W. Burrows and Jarvis R. Burrows, asking an injunction to restrain the defendants from interfering with Louis W. Merrifield, its president and general manager, in the execution of his duties as such officer, and to restrain the defendants from performing or attempting to perform any of the duties of said president and general manager. An injunction was granted without notice and was served. On January 16, 1908, the defendants moved the court to dissolve the injunction for want of equity on the face of the bill, and on the same day they filed an answer. On February 17 and 18, 1908, the motion to dissolve the injunction was heard upon affidavits and documentary and oral evidence, and was denied, and defendants prayed and were allowed an appeal to this court. On February 19, 1908, the defendants entered another motion to dissolve the injunction on bill, answer, affidavits and exhibits and testimony already heard, and that motion was denied, and defendants again prayed and were again allowed an appeal to this court. They filed two appeal bonds. The first appeal bond to be approved purported to be an appeal from both of said orders refusing to dissolve the injunction, and in the case made by that appeal a record has been filed, which does not contain their answer nor the proofs heard on that motion. The appeal bond last filed purports to be an appeal from the order denying the motion to dissolve, based upon the answer, affidavits and exhibits, and in the case made by that appeal a full record is filed. The cases have been consolidated in this court. Although the original motion was to dissolve the injunction for want of equity on the face of the bill, yet the subsequent action of defendants in filing an answer and in offering proofs in support of the motion, without any objection to that course of procedure, shows that the motion actually heard was not based merely upon the alleged want of equity on the face of the bill, but was upon the pleadings and

proofs. The only question for our consideration is whether the court erred in refusing to dissolve the injunction on pleadings and proofs.

The immediate controversy centers around the events of January 7 and 9, 1908. It will, however, aid in understanding the situation which led to the filing of the bill and in determining whether the conduct of defendants on those days tended to the destruction of the business and financial interests of the complainant, if we examine the prior history of the company and the prior conduct of the defendants towards it, leading up to the events which caused this application for an injunction, as such history is given by the proofs in this record. Leonard B. Merrifield was the husband of Mrs. Mary C. Merrifield, and the father of Louis W. Merrifield and Mrs. Lilla M. Wood. Leonard B. Merrifield established the business now conducted by complainant over thirty years ago at Mendota and transferred it to Ottawa over twenty years ago, and for several years before the defendants became interested in the company he owned the majority of the stock and personally managed the business. The charter of a former corporation, having the same name, expired in 1900, and the present corporation was then organized by Leonard B. Merrifield and members of his family and continued the business. The corporate stock was \$100,000, divided into 1,000 shares of the par value of \$100 each. In the latter part of 1902, defendants bought some stock in the company and Leonard B. Merrifield assisted them in buying enough more to give them one-half the total capital stock of the company. In acquiring this stock Thomas W. Burrows, about December 24, 1902, bought 140 shares from one A. H. Merrifield for \$33,600, giving in part payment therefor his note for \$30,000, with interest at 5% per annum, upon which note Leonard B. Merrifield became a guarantor, although he received no part of the consideration. The note was due in five years, but there was indorsed upon it an agreement that any

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amount might be paid thereon at any time. Thomas W. Burrows has never paid any part of this note. Leonard B. Merrifield died April 15, 1903. Thomas W. Burrows became administrator of his estate. A. H. Merrifield filed a claim against said estate on said note, and Thomas W. Burrows, the administrator and principal debtor, permitted it to be allowed against said estate on May 20, 1904, in the sum of \$30,606.25. At this time Thomas W. Burrows claimed that he had transferred these 140 shares to Jarvis R. Burrows, his brother, and that the latter had agreed to assist him in paying for them, and Thomas said that he could not pay the note at that time but could do so about the time of its maturity; and he proposed to the Merrifields that the funds of the complainant be used to pay this claim, and that he and Jarvis would give their note to the company for the moneys so used. This proposition was accepted by the Merrifield family and was agreed to by Jarvis R. Burrows. Thereupon Thomas W. Burrows and Louis W. Merrifield went to Chicago and negotiated a loan with W. T. Rickards & Company, loan brokers, on four notes of the company of \$5,000 each at four months' time, which notes were apparently indorsed by Louis W. Merrifield and Thomas W. Burrows before delivery, and to secure which Rickards & Company further required that Mrs. Merrifield should deposit certain collateral security, which she did. After deducting the interest in advance, these notes netted \$19,642.48. These proceeds were turned over to Thomas W. Burrows as administrator and were used in part payment of said claim of A. H. Merrifield. To pay the balance of said claim Thomas W. Burrows as vice-president of the company drew the check of the company for \$10,912.52 on December 16, 1904, and applied that also in payment of the claim. Thereupon, on December 16, 1904, Thomas W. Burrows and Jarvis R. Burrows gave their note to the company for \$30,045, due in three years, with interest at 5% per annum, payable annually, all of which is still unpaid, both princi-

pal and interest. Complainant charges in its brief that the defendants removed said note from the office and vaults of the company and destroyed it. We do not find any proof of this fact in the record, except a recital in a resolution adopted by the board of directors on January 7, 1908, but its removal at least seems to be conceded in defendants' supplemental brief, filed since the original argument, and they seek to justify it on grounds that we regard as wholly untenable. The removal of that note, however, by the defendants, the makers, and its destruction, if they did destroy it, were strongly calculated to destroy the confidence which the Merrifield family seem to have originally placed in the Burrows brothers. We understand the proofs to show that renewals of these four notes for \$5,000 each are in litigation in another suit now pending in this court.

It is charged in complainant's brief here that after the injunction herein was granted Thomas W. Burrows removed from the company's vaults about \$30,000 of the company's bills receivable, and that on a hearing he was found guilty of contempt and, upon returning the notes, was adjudged to pay a nominal fine. This seems to be conceded in the arguments for defendants, but, while the judgment finding him guilty of contempt is in this record, we find nothing to show what the nature of the contempt was.

Before Leonard B. Merrifield died, his son, Louis W. Merrifield, who will be hereinafter called Merrifield for brevity, was elected president of the company and, by virtue of the by-laws, became also general manager. As vice-president he had performed many of the duties of these offices during his father's illness of one year and a half preceding his death. The salary of the president and general manager was \$2,500 per annum. At the same time Thomas W. Burrows was elected vice-president and treasurer, and Jarvis R. Burrows, who was a practicing attorney, was elected auditor and attorney for the company, and a salary of \$2,500 per annum was established for each. Soon after Leonard

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B. Merrifield died, the health of Merrifield the president, became impaired, and Thomas W. Burrows, who was a physician and his medical adviser, urged him to go away for his health and insisted upon his doing so, and he did go away on that account and was absent two or three months each year for two or three years. During those absences Thomas W. Burrows, the vice-president, took charge of the business and acted as president and general manager, and when Merrifield was at home and around the factory during those years Thomas W. Burrows continued to a large extent to perform the duties of those offices because of the impaired health of the president. Thomas W. Burrows had never had any experience in the conduct of such a business. There is much dispute as to the result of his conduct of the business. That question cannot be safely determined on mere affidavits without a cross examination to bring out further details, but when all these affidavits are studied, we think it is made to appear, so far as it can be by affidavits, that the administration of Thomas W. Burrows was very injurious to the financial interests of the complainant and that thereby its indebtedness was greatly increased and its assets greatly impaired and reduced. A few weeks before Leonard B. Merrifield died, on motion of Thomas W. Burrows, a dividend of 50% was declared and paid upon the capital stock, and Thomas W. Burrows and Jarvis R. Burrows received \$25,000 on this stock, for much of which they had not paid. Nine months and twenty-two days later, on motion of Thomas W. Burrows, another dividend of 20% was ordered and paid, and Thomas W. Burrows and Jarvis R. Burrows received \$10,000 more upon this stock. Within less than ten months, on action initiated by them, they took out \$35,000 in dividends upon stock which was largely not paid for and for which they were heavily indebted either to the Merrifield family or to the company. Defendants contend that these dividends were taken out of the capital of the concern, whereas the proof for

complainant is that they were paid out of profits earned during the two preceding years. Whichever be true, these payments greatly reduced the funds on hand. True, the Merrifields consented to these dividends and received an equal amount. But they were in deep distress. When the first dividend was proposed, their husband and father, the founder of the business, was near the end of life, and when the second was made, the father was dead, the new head of the family and of the business was ill, and the business was in charge of his trusted physician, Thomas W. Burrows. Moreover, the Merrifield family were receiving dividends out of property which they owned, equitably as well as legally, and which was paid for, while Thomas W. Burrows and Jarvis R. Burrows received their dividends upon stock none of which was in their possession but all of which was in the possession of Mrs. Mary C. Merrifield as collateral security for an indebtedness of about \$30,000 which they owed to her. They have since received another dividend of 10%, so that they have taken out of the concern \$40,000 in dividends, besides their two salaries, aggregating \$5,000 per year, for nearly or quite five years.

The proof shows that when first Thomas W. Burrows failed to pay the indebtedness incurred by him for stock as hereinbefore stated, his sole excuse was his inability to pay, coupled with assurances that he would be able to pay later. The later failure of the Burrows brothers to pay is excused by them on the following ground: They state that Leonard B. Merrifield agreed with them that he would organize a New Jersey corporation to hold the stock of complainant or the majority thereof, and that he would so arrange the charter of the holding company that the Burrows brothers should have equal control of complainant with the Merrifield holdings; that Leonard B. Merrifield found obstacles in the way of organizing such a New Jersey corporation because of the requirements of the statutes of that state, and that because of his serious ill-

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ness and death he was prevented from devising some other scheme for accomplishing that result; and that because of his agreement to organize such a holding corporation in which they should have as much power as the Merrifield family, the Burrows brothers paid him for stock a larger price than he could otherwise have obtained. It is not stated that this contract was in writing nor is any such written contract produced. It seems to us to dispose of these excuses for not paying for this stock, as far as the present suit is concerned, to state that each of the notes now existing and outstanding referred to in this opinion were given long after Leonard B. Merrifield died. Moreover, the Burrows brothers have as much stock as the Merrifield family in this corporation and an equal right to its control, and that was all that they claimed Leonard B. Merrifield agreed to secure for them.

In March, 1907, Merrifield, the president, became satisfied that the assets of the company had greatly depreciated under the administration of Thomas W. Burrows, and he thereupon resumed full charge of the business. From that time on the Burrows brothers pursued a course of conduct tending to destroy discipline among the employes of the company, to provoke discord and to destroy the reputation and business of the company. In May, 1907, Thomas W. Burrows and Jarvis R. Burrows filed a bill in equity against the company and obtained the appointment of a receiver, who conducted its affairs till November 1, 1907, when the receiver was discharged, the property restored to the officers of the company, and they resumed charge of the business. The chancery case, or some branch of it, is still pending, and the proofs seem to indicate that the Burrows brothers have brought still another suit in equity, either against the company alone or against it and the Merrifields. Bitter complaint is now made of the reduction of the salaries of the treasurer and secretary to \$200 each per year, made on January 7, 1908, but the salary of the president and general manager

was at the same time reduced to \$400 per year, so that the reduction was equally fair to all. It was obviously done in an effort to save the company from the financial distress brought upon it largely by the conduct of the Burrows brothers.

In April, 1907, the company was the owner of real estate in South Dakota, obtained by it in liquidation of a claim it had against an agent. Jarvis R. Burrows, while acting as auditor and attorney for the company, claimed to have seen the land. Merrifield, the president, had not seen it and did not know how many acres there were nor the condition nor value of the land. Jarvis R. Burrows went to one Gonigam, a real estate agent in Ottawa, told him the company had a half section of land in South Dakota and needed money, and that some one in Chicago was talking of buying it, but was too slow, and asked him to make Merrifield an offer of \$2,000 for it, and told him he would furnish the money and would pay him \$500 for his services if he got the land for \$2,000. Gonigam wrote to an acquaintance in South Dakota and learned that the land would be "a great snap" at \$3,500 and told this to Jarvis R. Burrows. Gonigam then told Merrifield he had a party who would give \$2,000 for this South Dakota land. Merrifield asked Thomas W. Burrows what he thought about it and the latter referred Merrifield to Jarvis R. Burrows and told Merrifield that Jarvis had seen the land. Merrifield reported the offer to Jarvis R. Burrows and asked him how much land there was and what he thought of the offer, and the latter replied that there were 200 acres, and that it was worth perhaps a little more than \$2,000 and advised him to try and get a little more. Merrifield then offered Gonigam the land for \$2,500. Gonigam replied that his party would only pay \$2,000. Merrifield told Jarvis R. Burrows of this, and the latter advised him to accept the offer. By direction of Jarvis R. Burrows, Gonigam prepared a deed with the name of the grantee in blank, which was duly executed and delivered to Gonigam.

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Jarvis R. Burrows gave Gonigam \$2,000 in currency and the latter deposited the same in the bank, and delivered to the company his own check for \$2,000 and received the deed. He then delivered the deed to Jarvis R. Burrows with the name of the grantee in blank, and Jarvis R. Burrows paid Gonigam \$500 for his services. These facts had become known to the Merrifield family before the meeting of January 7, 1908, hereafter referred to. Soon afterward they made such investigations as showed that there were 320 acres of land, with a house, barn and granary upon it, and that it was worth from \$18 to \$20 per acre, or from \$5,760 to \$6,400. When Jarvis R. Burrows initiated and conducted this transaction, by which he caused the company to convey, and himself to acquire secretly, property with which he was acquainted and the president of the company was not, and at about one-third of its value, he was an officer of the company and was receiving from it a salary of \$2,500 per annum for his services to it. The only substantial reply to this proof of his unworthy and fraudulent conduct is to charge Merrifield and George R. Wood with being also guilty of improper conduct towards the company in financial matters. When all the facts are examined those counter charges appear to be groundless. The company had a power boat used to haul logs on the Illinois & Michigan canal. It ceased to be useful to the company and had not been used for a year, and its machinery had become rusty from disuse, and Merrifield offered to buy it for \$800, which was much less than it had cost. This was originally agreed to and, as he understood, with the approval of the Burrows brothers. When he found that they were dissatisfied he refused to buy it, and the company still owns it. Wood was a clergyman. When the troubles with the Burrows brothers became imminent, he removed to Ottawa and was appointed general superintendent of the company at a salary of \$2,500 per year. Defendants make bitter comments upon this, and scout the idea that the services of a

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clergyman could have any such value to the company. It was the same salary which the company was then paying Thomas W. Burrows, a physician, and Jarvis R. Burrows, a lawyer. But the proofs further showed that while the Burrows brothers had never had any experience in a business of this kind, Wood had spent several years in mechanical pursuits before he became a clergyman, and had spent about fourteen months in the different parts of this plant while it was under the control of Leonard B. Merrifield, its founder, and was familiar with his method of conducting the business, and had been a director in this company and its predecessor for nine of the last preceding ten years. At that time the Merrifield family, experienced in the business, had but one salaried office, while the Burrows brothers, new to the business, had two. But still further, when Wood found that the Burrows brothers were opposed to his acting in that capacity he declined to accept the office, and he never received the salary.

December 28, 1907, was the date fixed by the by-laws for the annual meeting of the stockholders. The stock was then held as follows: Mrs. Mary C. Merrifield, the widow of Leonard B. Merrifield, owned 150 shares; Louis W. Merrifield owned 180 shares; the daughter, Lilla M. Wood, owned 150 shares; her husband, George R. Wood, owned 20 shares. This amounted to 500 shares, or one-half of the capital stock. Thomas W. Burrows and Jarvis R. Burrows each owned 250 shares. Jarvis R. Burrows had acquired his through his brother Thomas. As already stated, the Burrows brothers had acquired this stock wholly or chiefly from the Merrifield family, and it was largely unpaid for, and they were not in possession of the certificates therefor, but all the stock the Burrows brothers owned was pledged with Mrs. Mary C. Merrifield to secure an indebtedness of about \$30,000 from them to her. Section 24 of our statute concerning corporations authorizes the pledgor of stock to vote thereon as stockholder at all meetings. Each stockholder was present at that

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annual meeting. For the year then ending the officers had been Louis W. Merrifield, president; Thomas W. Burrows, vice-president and treasurer, and Jarvis R. Burrows, secretary, and their term of office was "one year or until their successors shall be named," as the by-laws provided. The president called the annual meeting of the stockholders to order. This was in direct compliance with a by-law. Nominations were made for chairman of the meeting. A controversy arose as to whether each stockholder could cast one vote only for chairman or whether each could cast as many votes as he or she held shares of stock. The Merrifields had four stockholders present and the Burrows brothers two, and by the former method the Merrifields could elect the chairman. The proof shows that at all previous stockholders' meetings within the memory of the members of the Merrifield family then present, while the vote upon the election of directors had been by shares, yet on all other questions each stockholder had cast one vote, and that this course had been pursued at all previous stockholders' meetings attended by the Burrows brothers, and that no objection or question as to the legality or propriety of that course had ever been made by any one before December 28, 1907. At that meeting Jarvis R. Burrows insisted that every question should be voted upon by shares of stock. By an unanimous vote the meeting adjourned to January 7, 1908, in order to enable the president to take legal advice on that subject.

On January 7, 1908, the adjourned annual stockholders' meeting convened at a room called the directors' room, on the second floor of the office of the company at its factory in Ottawa, being the place fixed by the by-laws for the meeting. The president called the meeting to order. Mrs. Merrifield nominated George R. Wood for chairman, and Thomas W. Burrows nominated Jarvis R. Burrows. The president held that each stockholder present was entitled to one vote for chairman. He put the motion to nominate Wood, and

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four of the six stockholders present voted for the motion, and the president declared Wood elected and he took the chair. The Burrows brothers voted against the motion, and announced that they voted their 500 shares against it. Wood acted as chairman. There was much angry discussion. Jarvis R. Burrows read many protests and other documents which had been previously prepared. The minutes of two previous meetings were approved by a *viva voce* vote, against the protests of the Burrows brothers to that method of voting. A vote by shares of stock was had for directors for the ensuing year. There were five directors to be elected. The Merrifield family cumulated their 500 shares upon three names. The Burrows brothers cumulated their 500 shares upon three other names. The vote was a tie and there was no election. The preponderance of the proof shows that there was then some delay and silence; that no one requested another ballot for directors nor brought forward any other business. A motion to adjourn was then made and put to a *viva voce* vote by the chairman. Four stockholders voted for the motion and two, the Burrows brothers, against it. The chairman declared the motion carried, and the meeting adjourned. Defendants claim that Jarvis R. Burrows then said, "We will consider the stockholders' meeting still in session." The proof upon that subject will be considered later.

A meeting of the board of directors was then convened and called to order by President Merrifield. The by-laws provided that there should be two regular meetings of directors each year, the first of which should be held immediately following the annual meeting of the stockholders and on the same day. The old board of directors consisted of Louis W. Merrifield, Mary C. Merrifield, George R. Wood, Thomas W. Burrows and Jarvis R. Burrows, and they were all present and all participated in the meeting, and each of them voted upon various propositions submitted to a vote at that meeting. It is a debatable question whether this

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old board of directors could elect the officers of the company for the ensuing year, but we regard it as not subject to question that, as all the directors were present, this was a lawful meeting of the directors, and that they could transact the general business of the company at that meeting. Section 20 of our statute governing such corporations provides in effect, that when all the directors are present at any meeting, however called or notified, the acts of such meeting shall be as valid as if legally called and notified, if held within this State. In Cook on Stock and Stockholders, 2d Ed., section 620, and in 1 Cook on Stock and Stockholders, 3rd Ed., section 624, the law is stated to be that "the old directors continue in office until their successors are duly elected." It is manifest that any other rule would be ruinous to a corporation which for any reason failed to hold its annual stockholders' meeting at the prescribed time or, as here, whose stockholders are equally divided in opinion and are unable to elect anyone. In this State the stockholders cannot conduct the business of the corporation nor elect officers (except directors) nor can they make or amend by-laws. Therefore, directors must continue in office till their successors are elected, or else the business of the corporation must cease, if their term expires and for any reason the stockholders have failed to elect their successors. We therefore hold that these directors did not go out of office when the annual stockholders' meeting failed to elect directors for the ensuing year. At properly called meetings of directors the majority in number present controls if a majority of the board is present, and a majority carries any proposition submitted to vote, unless some statute or by-law requires more than a majority. When all the members are present no call is necessary. The by-laws authorized the president to call meetings of directors to order and to preside thereat. This was done here. The minutes of previous meetings were read and approved. A resolution was adopted, fixing the salaries as hereinbefore stated.

The by-laws required that the salaries of officers should be fixed annually by resolution of the board of directors. The year for which the president, vice-president, treasurer and secretary were elected had expired. We do not doubt that this board of directors could lawfully take this action. It may be that if the stockholders had afterwards held another meeting and elected a new board of directors, the latter could rescind this action and fix other salaries before electing officers, but unless that was done this action fixing salaries would stand. Other action relative to the business of the company was proposed and carried by a majority vote at this meeting.

The action of which defendants chiefly complain is that the board at that meeting entered upon the election of officers for the ensuing year and elected Merrifield president, and Wood vice-president. No nominations were made for secretary and treasurer and those offices were not filled. Ever since the Burrows brothers had been stockholders the course pursued by unanimous consent had been that the Merrifield family, who owned one-half the stock and held the other half as collateral security as above stated, should hold three of the five directorships and the office of president, which included general manager, and that the Burrows should hold the offices of vice-president and secretary and treasurer. The Merrifields had thus held the majority of the directors and the Burrows brothers the majority of the other offices. Much friction had arisen because of the acts of Thomas W. Burrows, the vice-president, when acting as president in the absence of Merrifield, and also when Merrifield was at home and able to perform the duties of president himself. The Merrifield family seem to have decided at this meeting that they would also control the office of vice-president. Having elected the president and vice-president, they were ready to concede the offices of treasurer and secretary to the Burrows brothers, but no nominations were made for those offices and there-

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fore no vote was taken. If this was a valid election of officers then Merrifield became president and general manager and Wood vice-president by that election, and Thomas W. Burrows held over as treasurer till his successor should be elected, and Jarvis R. Burrows held over in like manner as secretary. If this was not a valid election of officers, then the old officers held over and Louis W. Merrifield was still president and general manager, Thomas W. Burrows, vice-president and treasurer, and Jarvis R. Burrows secretary.

The by-laws provide that the officers shall be chosen by the board of directors and shall hold office for one year or until their successors are chosen, and provide for two regular meetings of the directors, the first on the same day as the annual meeting of the stockholders and immediately following such meeting, and the second on the second Tuesday of June. It seems that by an amendment to the by-laws regular monthly meetings of the board of directors were also provided for. The by-laws do not provide that the officers shall be elected at the regular directors' meeting to be held immediately after the regular stockholders' meeting, though that was the practice and was probably intended. The by-laws do not provide that the officers for the ensuing year cannot be elected till the new board of directors is chosen. The regular annual stockholders' meeting of this company convened at the date fixed by the by-laws, adjourned to January 7, 1908, and then convened and found that no business could be transacted, and then adjourned without fixing a date for a further meeting, and thereby that annual stockholders' meeting was terminated if the vote to adjourn was lawfully carried, or if, after the vote to adjourn was irregularly adopted, all the stockholders left the place of meeting, which we shall hereafter see was the fact. The annual stockholders' meeting was therefore terminated, and the old board of directors was left in office, with no probability that their successors would soon be chosen. If one of the officers had thereafter

died or resigned, we do not doubt that this old board of directors could have filled that vacancy. This board of directors continued to be the governing body of the corporation. We know of no rule of law which gave them any less power and authority, after the expiration of the year and while they still remained directors because of the failure to elect their successors, than they had during the year for which they were primarily elected. They were only elected to serve one year, but they were also elected to serve till their successors were chosen. In 2 Cook on Stock & Stockholders, 3rd Ed., section 713, it is said: "An officer who holds over by reason of the failure of the corporation to elect his successor is not only a *de facto* but a *de jure* officer." There is therefore strong reason for holding that this board could elect officers on January 7, 1908, when they were in session. If they could, then Merrifield was duly elected president for the year 1908. If they could not, then he was still in office as president and general manager by virtue of the election of the preceding year, as his successor had not been elected. Therefore, when this directors' meeting adjourned on January 7, 1908, Merrifield in any event was still the president of the complainant corporation, and he still holds that position, unless he was deprived of that office by what occurred later on that day.

The Burrows brothers had brought a stenographer with them who remained through the two meetings already described and took notes of part of what was said and done, and transcribed those notes and attached the transcript to his affidavit filed by defendants, and swore to its correctness. It is not contended that he took down all that was said and done. Indeed, when it was requested at the meeting in behalf of the Merrifield interests that what was done be correctly taken down by the stenographer, Jarvis R. Burrows replied that the stenographer was acting for him and would take down what he directed. These minutes show that after the chairman had declared the stock-

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holders' meeting adjourned, Jarvis R. Burrows said: "We will consider the stockholders' meeting still in session." The proof introduced by defendants tended to show that this statement was made in a loud voice and that, during the directors' meeting which followed, both Jarvis R. Burrows and Thomas W. Burrows stated plainly and loudly that they considered the stockholders' meeting not lawfully adjourned, but still in session. The proof introduced by complainant tended to show that no such language or notice was heard by any member of the Merrifield family present, nor by Duncan McDougall, who was present as their legal adviser. Mrs. Lilla M. Wood was not a director, and when the stockholders' meeting adjourned she went down stairs and waited in the office below for the conclusion of the directors' meeting. After that meeting adjourned Merrifield, Wood, Mrs. Merrifield, McDougall and the stenographer went down stairs, put on their overcoats and wraps, and with Mrs. Wood left the premises. The sharply controverted question of fact is whether Thomas W. Burrows and Jarvis R. Burrows came down stairs with the others. We have carefully studied the evidence on this subject. We cannot see into the hearts of these witnesses and know with absolute certainty who told the truth. We can only judge by those surrounding facts and circumstances, including the number of witnesses testifying to the one or the other contention, which induce reasonable persons to conclude that one version is true rather than the other. To repeat in detail what each witness stated and each reason which inspires confidence in one statement more than another would extend this opinion to an unreasonable length. The evidence leads us to the conclusion that the members of the Merrifield family and the solicitor were not given to understand when they left the room, or before they left it, or before they left the building, that it was claimed by the Burrows brothers that the stockholders' meeting had not adjourned and was still in session, or was to con-

tinue in session, and that they left the building in entire ignorance of the existence of any such claim or intention on the part of the Burrows brothers. We also conclude from the evidence that Thomas W. Burrows and Jarvis R. Burrows came down stairs with the others as if to leave the building, and that no stockholder remained at the place where the meeting had been held; that Thomas W. Burrows put on his overcoat, and that they allowed the stenographer to leave the premises; and that all this was done to prevent the Merrifields from having any suspicion of what they intended to do. We are also of opinion that when all the stockholders had left the room and the story of the building in which the stockholders' meeting had been held, that meeting stood adjourned and abandoned, even if the motion to adjourn that meeting was irregularly put to vote and was not lawfully adopted.

At common law each stockholder in a private corporation had but one vote at a stockholders' meeting, no matter how many shares he owned. 1 Cook on Stock and Stockholders, section 609. It was held in *Taylor v. Griswold*, 2 Green (N. J.) 232, that at the meeting of stockholders of a bridge company the vote is carried by the majority of the corporators present and voting in person, where the charter is silent and the subject is not regulated by the by-laws. Section 3 of our statute concerning corporations gives a stockholder the right to vote in elections for directors for the number of shares owned by him and also to cumulate such shares and votes. If the statute had intended that all voting at stockholders' meetings should be by the number of shares it would seem natural that it would have been so provided in that section. Counsel have not called our attention to any decision upon this subject in this state. In other states, however, it is held that the majority in interest at a stockholders' meeting should control, or in other words that the voting should be by shares of stock. This is recognized in *Weinburgh v. Union Street Ry. Adv. Co.*, 55 N. J. Eq.

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640, where Taylor v. Griswold, *supra*, was distinguished as a case where personal duties were imposed upon stockholders, requiring their personal action. Hays v. Commonwealth, 82 Pa. St. 518, was a case where the charter gave the stockholder one vote for each share of stock at general meetings of stockholders. That rule was applied generally in Baker's Appeal, 109 Pa. St. 461. In Procter Coal Co. v. Finley, 98 Ky. 405, it was held that the common law that each stockholder was entitled to but one vote was not applied to present day business corporations, especially if the corporation adopt a by-law authorizing a vote for each share of stock. The constitution of Kentucky recognized the right of voting by shares. The text books generally state it as a principle of modern corporation law that each stockholder is entitled to one vote for each share of stock owned by him. In examining cases cited to support that doctrine it will be found that they frequently rest upon the constitution, or upon a statutory provision or upon a by-law of the corporation adopted by authority. Our constitution (section 3 of Article 11) only gives the stockholder the right to vote the number of shares of stock owned by him, or to cumulate said shares, in the election of directors or managers. While the question thus appears to be an open one in this state, we are of opinion that on principle the voting should be by shares of stock, and that the rulings by the president and the chairman of the stockholders' meeting of January 7, 1908, were incorrect. But it is also obvious that no harm was done to defendants thereby. If the president had put the nomination for chairman to vote by shares of stock no chairman would have been elected, and the meeting would never have organized, and perhaps would not have required a motion to adjourn. No business could have been transacted at that meeting, in view of the determined stand taken by each party. If a motion to adjourn could not have been carried, still they must have abandoned the effort to

hold the meeting when their physical endurance was exhausted. Nothing was accomplished at the meeting as it was actually held. Nothing would have been accomplished at the meeting if the stockholders had been permitted to vote by shares of stock upon every motion. We hold that the departure of all the stockholders from the directors' room and from that story of the building was an abandonment of any attempt to hold a stockholders' meeting.

After the Merrifields and their solicitor and the stenographer had left the premises and had gone to their homes and places of business, the Burrows brothers went back up stairs to the meeting room; called two employes to witness what was done, and then proceeded to hold a stockholders' meeting with Thomas W. Burrows presiding as vice-president, voted 500 shares each for Thomas W. Burrows, Jarvis R. Burrows, Agnes J. Burrows, John H. Williams and Edward S. Jacobs as the directors for the ensuing year, and declared them elected. Agnes J. Burrows is the wife of Thomas W. Burrows. The briefs say that Jacobs is her brother. Williams testified that he was an employe of the company, but the briefs of complainant treat him as a discharged employe, and there is other proof that he was not then in the service of the company. Burrows then telephoned for Mrs. Burrows. She came promptly, and they then held a pretended directors' meeting, with the Burrows brothers, Mrs. Burrows and Williams present, and they elected Thomas W. Burrows president and treasurer, Jarvis R. Burrows secretary, and Agnes J. Burrows vice-president. Agnes J. Burrows and Williams and Jacobs were not stockholders. The by-laws had provided that the directors should be stockholders. While the certificates for all the shares of stock owned by the Burrows brothers were in the possession of Mrs. Merrifield to secure their debt to her, they could not transfer part of them to others so as to increase the number of stockholders favorable to the Burrows brothers

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whom they could elect as directors. If they should have an opportunity to control such a pretended stockholders' meeting as that now under consideration, they would still be obliged to elect a majority of the directors out of the other stockholders, namely those of the Merrifield family. In apparent anticipation of the situation now under consideration, Thomas W. Burrows while still in the confidence of the Merrifield family, moved an amendment to the by-law on the subject of directors, and that motion was adopted. That amended by-law omitted the requirement that the directors should be stockholders. That laid the foundation for the action of this pretended stockholders' meeting by which the majority of the directors declared elected, and to whom it was proposed to commit the control of the property and business of this company, were not stockholders and had no financial interest in it. But for the adoption of this amended by-law on the motion of Thomas W. Burrows, this pretended stockholders' meeting, if it elected directors at all, must have selected the majority of them from the stockholders of the Merrifield family. Having thus, so far as it could, turned the affairs of this company over to a board whose majority owned no stock in it, the meeting took some other action concerning the business of the company and then adjourned. We are of opinion that the defendants intentionally deceived the stockholders of the Merrifield family and their solicitor in order to enable the defendants to seize the control of this corporation. There is proof that when they came down stairs the last time Jarvis R. Burrows said: "We have them fixed now," and that two days later Thomas W. Burrows said, while at the factory: "All of Louis W. Merrifield's money is in this business here. When we get through with Louis W. Merrifield he will not have two dollars to rub together." In 1 Cook on Stock & Stockholders, 3rd Ed., section 601, it is said that "where there is an absence of good faith, and an adjourned meeting is held in such a way as to prevent

certain of the stockholders from knowing it, the proceedings are invalid." We are of opinion that this later attempted stockholders' meeting was intentionally concealed from half of the stockholders, and that it was fraudulently held and is invalid; that the five parties there selected as directors were not lawfully elected to that office; that the pretended directors' meeting held immediately thereafter was wholly a void proceeding, and that the persons there named as officers were not thereby made officers of the complainant. The proof shows that the others officers of the complainant and the members of the Merrifield family did not know of the holding of these meetings and of these alleged elections till January 9. On that day Thomas W. Burrows came to the factory, posted notices signed by him as president, announced changes of rules, and notified employes to pay no further attention to the orders and directions of Merrifield but to come to him therefor, and took possession of the mail of the company and refused to deliver it to Merrifield or to advise him of its contents. Thereupon on the same day this bill was filed and this injunction was issued.

It is argued that this is in reality a suit between Merrifield and Thomas W. Burrows to try the title to the office of president; that *quo warranto* is the form of action at law in which such a controversy must be tried; and that equity has no jurisdiction to determine that question. If the title to an office is the only matter involved, equity will not take jurisdiction. *Lawson v. Kolbenson*, 61 Ill. 405, 418. Where, however, the title to an office in a private corporation is necessarily involved in a case properly before a court of equity, the court will determine it, with all the other questions in the case, in order to give perfect relief. *Chicago Macaroni Co. v. Boggiano*, 202 Ill. 312, 316. Nothing in the bill raised any question of the title to the office of president. The bill alleged that Merrifield was president; that he had been elected for the year 1907 and again on January 7, 1908, for the year 1908, and that

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Thomas W. Burrows and Jarvis R. Burrows were directors and were holding over as treasurer and secretary respectively; that they were conspiring to injure the business of complainant; that they were usurping the duties and functions of the office of general manager, which office was held by the president by virtue of the by-laws; that they were interfering with and obstructing Merrifield in the performance of his duties as general manager so as to seriously injure complainant's business; that on the day the bill was filed Thomas W. Burrows secreted the mail of the complainant so that Merrifield as president and general manager could not know what the same contained, and refused to produce the same when requested; that Thomas W. Burrows for the purpose of disorganizing the business of complainant, on the morning of said day placed notices on the walls of the working compartments of complainant, changing the working hours of the employes, and signed his name thereto as president of complainant; that said Thomas W. Burrows has usurped the functions and installed himself in the office of president and general manager and is performing the duties of president and general manager for the purpose of disorganizing the business; and that he gave orders to the foreman and discharged several employes and re-employed certain agents whom Merrifield had laid off. The bill contained many charges that Thomas W. Burrows and Jarvis R. Burrows were endeavoring by these means to ruin the business and financial standing of complainant and to prevent its paying its debts. The bill contained no suggestion that either of the defendants claimed any title to any office which would authorize them to thus meddle in the business of the company. The evidence sustained these allegations. The answer set up that defendants were doing this by virtue of a stockholders' meeting and a directors' meeting held on January 7, 1908, under the circumstances already narrated. The bill and the evidence to support it made a case for complainant. De

fendants set up an alleged title to office to justify their conduct, which conduct was wholly unwarranted unless the meetings which they set up in their answer were legal and valid. It is obvious that the ability of this company to do business was at stake. We are of opinion that the company had a right to call upon a court of equity to protect it from the actions of the defendants, if they were in fact acting without authority of law. The proof shows that they were unlawfully interfering with its management in a manner which would be destructive of its business life. It had a right to call upon a court of equity for protection. It is not shown that the corporation had not given Merrifield, as its president, authority to begin this suit in its name, and it is a general rule that a corporation acts through its president, and in the absence of proof to the contrary he will be presumed to have authority to represent the corporation. *Jones & Dommersnas Co. v. Crary*, 234 Ill. 26. Indeed, if this right to file the bill had been disputed, it would have been necessary for the court to hear the proofs of what occurred on January 7, 1908, and to determine the legal effect of all that action, in order to ascertain whether the corporation could act through Merrifield in filing this bill. Moreover the proof is that the records of the company show due authority to institute this suit.

There was another ground of jurisdiction stated in the bill. It not only showed that defendants were pursuing a course of conduct calculated to destroy the financial standing of complainant, but it also charged that defendants were insolvent and therefore incapable of compensating the corporation in damages for the injury they were inflicting. It is argued that as the bill states that defendants owned 500 shares of the capital stock of complainant and that these have a very considerable value, this negatives the charge that defendants were insolvent. This position is untenable. That statement was made in giving the names of the stockholders and the number of shares each owned.

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The bill did not state that they had paid for these shares nor what other debts the defendants owed. The proof shows that these shares are all pledged to and in the possession of Mrs. Mary C. Merrifield to secure the debt of defendants of about \$30,000 to her; that defendants owe about \$85,000 and that they have no property subject to execution. Merrifield's affidavit is that defendants owe "other people" more than \$85,000. The proof tends to show that they owe the complainant company and Mrs. Merrifield over \$60,000. If the words "other people" mean "besides the two last named," then their indebtedness exceeds \$145,000. Defendants do not disclose any property except this pledged stock. The value of these shares is very problematical in view of the course of conduct pursued against complainant, calculated to destroy its business and financial standing.

But it is a question whether defendants can now assail the jurisdiction of the court. On the day after defendants filed their answer they filed what they called a petition, and secured an injunction against the company and its directors from electing a treasurer and a secretary of the company for the ensuing year, pursuant to a notice by Merrifield as president, calling a special meeting of the board of directors for that and other purposes. It is a general rule that an injunction is only issued upon a bill or cross-bill in equity. *Bryant v. The People*, 71 Ill. 32; 2 High on Injunctions, section 1566. It is stated in the work last cited that where a court of equity is already in possession of a cause and has jurisdiction of both the subject-matter and of the parties, it may enforce obedience to its mandates by an injunction issued merely upon a petition in the cause, without the filing of a bill. The pleading by defendants upon which they obtained the injunction referred to either confessed in effect that the court already had jurisdiction of that subject-matter, or else it was in reality a cross-bill. In either event, defendants thereby sought and

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obtained relief similar in principle to that sought by complainant, and after they had sought and obtained such relief, their right to question the jurisdiction of the court to grant such relief is doubtful.

We are of opinion that the proof in this record sustained the allegations of the bill and warranted the court in refusing to dissolve the injunction. We think it proper, however, to say that inasmuch as these conclusions are based upon affidavits drawn *ex parte*, we shall not feel bound thereby in any future hearing of this case upon the merits, if a cross-examination of the witnesses shall materially change the tenor of the testimony. For the reasons stated the order is affirmed.

Affirmed.

PER CURIAM. In their petition for a rehearing appellants complain that the language of the court in describing their conduct is too severe, in view of the fact that the motions were heard mainly upon affidavits and documentary evidence. They say that when, upon a final hearing, the witnesses are cross-examined and when appellants offer other proof which they possess but did not present at the hearing now under review a very different complexion will be given to many of the transactions described in the opinion. We think we sufficiently guarded against that contingency at the close of the opinion. Motions in chancery cases are usually heard upon affidavits, and such a case upon appeal must be discussed upon the proofs which were presented to the court below. It would not have been permissible for us to say that while the conduct of appellants with reference to the corporation seemed highly improper, yet we would not discuss or act upon what the record disclosed because upon the cross-examination of witnesses and the production of other proof at a final hearing a different state of facts might appear. We must discuss the case upon such a record as the parties present. If they

have failed to present the real facts, we cannot assume or guess that the record is untrue, but must take it as it is. Appellants say in their petition for a rehearing that they did not receive the dividends referred to in the foregoing opinion, and that the record does not disclose that they received them. On page 87 of the abstract filed by appellants, in an affidavit read in evidence, is the statement that on March 6, 1906, on motion of Thomas W. Burrows a dividend of fifty per cent. was declared, and that of that dividend "said Thomas W. Burrows and said Jarvis R. Burrows *were paid* on the stock then held by them, being fifty per cent. of all the stock of said corporation, the sum of \$25,000;" that on December 28, 1906, at a meeting of the directors, upon the motion of Thomas W. Burrows, a further dividend of twenty per cent. was ordered and paid, and that "said Thomas W. Burrows and Jarvis R. Burrows then owned fifty per cent. of said stock and *received* the sum of \$10,000 thereon." The next sentence relates to the next dividend of ten per cent. and is less specific, but implies that it was paid in the same way. The record before us therefore contained positive proof that appellants *received* these dividends. If that statement was in any respect incorrect or inexact or incomplete, or if, as now alleged on petition for rehearing, the pledgee of the stock actually received these dividends upon the debt for which the stock was pledged, appellants should have introduced proof upon that subject. Some of the facts stated by us in reference to the indebtedness of appellants for the capital stock were derived from part of an answer of L. W. Merrifield and others in another chancery suit, read in evidence in this case. The answer had not been sworn to, but it was referred to in an affidavit of L. W. Merrifield in this case, and we treated it as incorporated in that affidavit. It is insisted that the language of that affidavit was not sufficient to make the answer a part of it, but, though the affidavit could have been made plainer, we are

clear that it was intended to incorporate that part of the answer in the affidavit. We have considered the other points urged in the petition for a rehearing and they do not change our conclusion. Where the affidavits were conflicting we examined all of them and stated our judgment as to what was proved, but it would have extended our opinion to an intolerable length to state, in detail, the testimony of each witness and to give our views as to the weight to be accorded to each. We adhere to our conclusion upon the proofs contained in this record. The petition for a rehearing is denied.

Lillian Walters, Appellee, v. City of Ottawa, Appellant.

Gen. No. 5,020.

1. **STATUTE OF LIMITATIONS**—*when declaration does not state new cause of action.* An amended declaration filed in an action against a city for a sidewalk injury does not state a new cause of action where it differs from the original in that it sets up the statutory notice while the original declaration made no reference thereto.

2. **VERDICT**—*when not disturbed as against the evidence.* A verdict based upon conflicting evidence will not be disturbed on review if the evidence was sufficient to sustain the jury's finding.

3. **VERDICT**—*when not excessive.* A verdict of \$1,000 in an action on the case for personal injuries is not so excessive as to call for *remittitur* by the appellate court where a serious injury to the ankle has been shown.

4. **TRIAL**—*when argument of counsel will not reverse.* Improper remarks in opening and in argument will not reverse unless resulting prejudice appears.

Action in case for personal injuries. Appeal from the Circuit Court of LaSalle county; the Hon. EDGAR ELDRIDGE, Judge, presiding. Heard in this court at the April term, 1908. Affirmed. Opinion filed October 14, 1908.

J. L. FERGUSON, for appellant; BUTTERS, ARMSTRONG & FERGUSON, of counsel.

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BROWNE & WILEY, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

The city of Ottawa maintains a cinder sidewalk on the west side of Poplar street between Jefferson and Jackson streets. On August 28, 1906, Mrs. Lillian Walters, the appellee, was walking along thereon in the evening and stepped into a hole or depression therein, and she claims that she was thereby severely and permanently injured and that the small bone of her ankle was broken. She gave notice thereof to the city attorney and to the city clerk in full compliance with the act of 1905 in regard to suits against cities for personal injuries. Hurd's R. S. 1905, 1153, 1154. These notices were given on September 15 and 18, 1906. On September 25, 1906, she brought this suit and filed a copy of said notices with the clerk of the Circuit Court in this cause on that day. She filed a declaration in every respect sufficient, except that she made no allegation concerning the giving of such notices as the statute requires. To this the city filed a plea of the general issue. The statute referred to limits the time within which a suit for such an injury may be brought against a city to one year. On November 29, 1907, after that year had elapsed, the city withdrew its plea of the general issue by leave of court and filed a demurrer to the declaration, which was sustained because of the failure to allege said notice. Thereafter appellee filed an amended declaration in all other respects sufficient and which alleged the giving of sufficient notice in a sufficient manner within the time fixed by statute. Appellant pleaded the general issue and said one year limitation. The court sustained a demurrer to the plea of the Statute of Limitations and appellant elected to abide by that plea. There was a trial and a verdict for appellee for \$1,000, upon which appellee had judgment, and the city appeals.

It is contended, first, that the court erred in sustaining the demurrer to the plea of the Statute of Limitations. To this there are, we think, two sufficient answers.

1. The notice to the city attorney and to the city clerk is not a part of the cause of action, and therefore the amended declaration did not state a new cause of action. This appears from considering what is the cause of action in such a case. The cause of action here is that there was a cinder sidewalk upon which the city invited foot passengers to travel; that in said walk was a deep hole or depression, dangerous to foot passengers, especially to those walking there in the night time; that it had been in that condition for a long time, and for so long a time that the officers of the city chargeable with the care of its streets and sidewalks would have known of this dangerous hole in time to have repaired it before plaintiff was hurt, if they had exercised ordinary care; that plaintiff was passing along that walk in the evening after dark and had never passed there before and was ignorant of the existence of the hole, and was exercising due and ordinary care for her personal safety, and while so doing she accidentally stepped into said hole and was thereby injured. If those facts are established by a preponderance of the evidence, then plaintiff has shown that when plaintiff left that place that night a cause of action had arisen in her behalf against the city; that the city was guilty of negligence which had caused her an injury while she was exercising due care, for which injury the city was liable to her. The subsequent notice to the officers of the city did not add anything to the cause of action in any proper sense. It did not establish any greater degree of responsibility on the part of the city, nor tend to show any more care by plaintiff for her personal safety. It related to the remedy for the injury and not to the cause of action therefor. The statute merely required that such notice should be given the city within a specified

time after the injury, in default of which the injured party should not be permitted to maintain a suit against the city for that cause of action. This is implied in the statute itself. It requires, in express terms, that the notice shall be given within six months from the date "when the cause of action accrued," and also that the notice shall state "the name of the person to whom such cause of action had accrued." This means that that which the statute treats as the cause of action has already accrued before the notice is given or can be given, and not that the giving of the notice is a part of the cause of action. *Erford v. City of Peoria*, 229 Ill. 546, relied upon by appellant is in harmony with this view. In that case the statutory notice was neither alleged nor proved. In the statement preceding that opinion the court said: "It is not contended that the declaration failed to show a right of action nor is it contended that appellant failed to make out a good cause of action on the trial." That is equivalent to saying that a good cause of action was alleged and proven though the notice was neither alleged nor proven, for want of which the action could not be maintained.

2. A defective statement of a right of action may be cured by amendment regardless of the Statute of Limitations.

It is clear that under the decision in *Erford v. City of Peoria*, *supra*, and under cases cited by appellant from other states, it was necessary that the giving of the notice required by the statute should be alleged in the declaration. *Reinig v. City of Buffalo*, 102 N. Y. 308; *Thrall v. Village of Cuba*, 88 N. Y. App. Div. 410; *Wentworth v. Town of Summit*, 60 Wis. 281; *Dorsey v. City of Racine*, 60 Wis. 292; *Sowle v. City of Tomah*, 81 Wis. 349; *Pardey v. Mechanicsville*, 101 Iowa 266; *City of Lincoln v. Grant*, 38 Neb. 369. In some of these cases the notice is treated as if a part of the cause of action. In none of these cases is it intimated that that which was imperfectly stated by

reason of the omission of the allegation of the statutory notice may not be amended. In some of them there is an intimation that the declaration or complaint could have been amended. "The Statute of Limitations does not apply to mere matters of pleading and it should not be given that effect indirectly by holding that an imperfect statement of a cause of action is no statement of it." *No. Chicago Ry. Co. v. Aufman*, 221 Ill. 614; *Chicago City Ry. Co. v. Hackendahl*, 188 Ill. 300. In *Chicago City Ry. Co. v. Cooney*, 196 Ill. 466, the original declaration failed to allege that plaintiff had exercised due care, and that was a necessary and material allegation. After the Statute of Limitations had run an amended declaration was filed which contained that allegation. A plea of the Statute of Limitations was filed thereto and a demurrer was sustained to said plea. It was held that the original declaration stated a cause of action, though defectively, and that the amendment did not state a new cause of action. We are of opinion that if it should be held that the notice was a part of the cause of action, still the original declaration was but a defective statement of the cause of action, and that the amended declaration did not state a new cause of action, but merely remedied the previous defective statement. For these reasons the demurrer to the plea of the Statute of Limitations was properly sustained.

The size and extent of the hole or depression in the cinder walk and whether it was inside of the limits of the street, and whether it had formed almost immediately prior to the injury or had existed for months and for so long a time that the city authorities in the exercise of ordinary care should have ascertained and remedied the defect, were questions of fact upon which the evidence was conflicting. There was evidence in the record sufficient to sustain appellee's allegation in these respects. The jury decided these controverted questions in favor of appellee and the trial judge ap-

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proved their finding. The state of the evidence is not such that we would be justified in reversing the verdict and judgment for lack of evidence to support it.

It is argued that the damages are excessive. We would have been satisfied with a smaller allowance, but if the testimony of appellee and of the physician who examined her ankle shortly before the trial is true, her injuries were sufficiently serious so that a reviewing court would not be justified in disturbing a verdict for \$1,000.

Complaint is made of language used by counsel for appellee in his statement of appellee's case at the opening and in his subsequent argument to the jury. We do not approve of one or two things which he said, but we do not feel warranted in reversing the judgment on that account. We find no reversible error in the record. The judgment is therefore affirmed.

Affirmed.

Fannie E. Smith, Appellant, v. Bankers' Union of Chicago, Appellee.

Gen. No. 4,965.

1. CORPORATIONS—*when may interpose defense of ultra vires.* The law is that though a corporation may have received the benefits of a contract yet if that contract requires an act not authorized by the charter of the corporation it may raise the defense of *ultra vires*; but if the contract is within the chartered authority of the corporation, then if the corporation has received the benefit of the contract, it may not raise the defense of *ultra vires*, even if there has been a failure to comply with some regulation, or if the power has been improperly exercised.

2. FRATERNAL BENEFIT SOCIETY—*when transferee company liable upon certificate.* Held, that the declaration in this case set up a good cause of action as against a transferee company by a member of the fraternal benefit society which had transferred its business.

Assumpsit. Appeal from the Circuit Court of Carroll county; the

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HON. RICHARD S. FARRAND, Judge, presiding. Heard in this court at the April term, 1908. Reversed and remanded. Opinion filed October 14, 1908.

W. H. A. RENNER and O. M. GROVE, for appellant.

RALPH E. EATON, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

This suit involves the acts of two mutual benefit life associations authorized to do a general mutual life insurance business in the State of Illinois, the first bearing the name the Bankers' Union of the World, Omaha, Nebraska, hereinafter called the Omaha Company, and the other named the Bankers' Union of Chicago, Illinois, hereinafter called the Chicago Company. The former was organized under the laws of Nebraska, and was authorized to do business and did business in Illinois. The latter was organized under the laws of Illinois. On October 23, 1903, the Omaha company issued a beneficiary certificate, No. 38172, dated October 15, 1903, for \$2,000 upon the life of Oscar P. Smith of Milledgeville, Illinois, payable to his wife, Fannie E. Smith, as beneficiary. On August 27, 1906, the Chicago Company issued a certificate, No. 1867, the body of which was as follows:

"This certifies that the attached life Insurance Policy No. 38172, heretofore issued by The Bankers Union of the World, of date October 15, 1903, has been transferred to and assumed by the Bankers Union of Chicago, Illinois, and that said member and his beneficiary named in said certificate, each is and will be respectively entitled to the same benefits as in said policy set forth, subject to the provisions of the Constitution and By-Laws of the said The Bankers Union of the World, in force at the date of this transfer."

On September 7, 1906, Oscar P. Smith indorsed thereunder his consent to said transfer and his acceptance of the provisions thereof. This is a suit brought

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by said beneficiary against the Chicago Company upon said two instruments. A third amended declaration was filed containing five counts. The court sustained a demurrer to the declaration. Plaintiff elected to abide by the declaration and there was a judgment that "the defendant go hence without delay," which we assume meant "without day", at plaintiff's costs. This is an appeal by plaintiff from that judgment.

Each count of the third amended declaration set out both said instruments and averred that Oscar P. Smith died while said instruments were in force; that he was a member of the Omaha Company and by said transfer became a member of the Chicago Company; that he had paid all assessments and complied with all laws of said order; and that due proofs of death were made to and received by the Chicago Company and that it refused to pay. The third count is the fullest in allegation and, besides the foregoing, also alleged that defendant guaranteed to pay said policy No. 38172, issued by the Omaha Company; that said Omaha Company, before doing business in Illinois, complied with each of the provisions of paragraphs 255, 256, 257, and 258, of Starr & Curtis's edition of Chapter 73 of the Statutes of Illinois (which are the same as sections 3, 4, 5, and 6 of the act in relation to fraternal beneficiary societies, appearing in Hurd's Revised Statutes of 1905 at pages 1223 to 1225); that before the Chicago Company issued said certificate No. 1867, said Omaha Company, by a two-thirds vote at a meeting of all the insured, decided to transfer its certificates to the Bankers' Union of Chicago, which meeting was held and vote cast in full compliance with paragraph 240 of Starr & Curtis's edition of Chapter 73 of the Revised Statutes of Illinois (being section 16 of the Act of June 22, 1903, concerning life and accident insurance on the assessment plan, found in Hurd's Revised Statutes of 1905, on page 1219), which provides when and how the corporations specified in said act may transfer their risks. Said third

count alleged that the transfer of said policy to said Chicago Company was in full compliance with every provision of the statute of Illinois, and was acted upon and accepted and entered of record by the proper insurance officers of the State of Illinois, and that the Chicago Company promised to pay to said beneficiary the amount named in said certificate. Said count also alleged that the Chicago Company, the defendant, held a sufficient fund in trust to guarantee and pay all the policies of the Omaha Company in full, including the certificate in question, and that the Chicago Company had previously collected from the Omaha Company the sum of \$2,000 and held the same in trust for and to be paid over to the beneficiary in this certificate on demand, after complying with the by-laws and constitution of the defendant. Said third count contained many other allegations. In view of section 7 of the Act of June 22, 1903, in reference to life and accident insurance on the assessment plan, we are disposed to hold that this company was subject to the provisions of that act. If so, then each count of this declaration shows a compliance with the provisions of section 16 thereof, and that the risk had been lawfully transferred from the Omaha Company to the Chicago Company.

The law is that though a corporation may have received the benefits of a contract, yet, if that contract requires an act not authorized by the charter of the corporation, it may raise the defense of *ultra vires*; but if the contract is within the chartered authority of the corporation, then if the corporation has received the benefit of the contract, it may not raise the defense of *ultra vires*, even if there has been a failure to comply with some regulation, or if the power has been improperly exercised. *Wood v. Mystic Circle*, 212 Ill. 532. The certificate issued by a mutual benefit society is in the nature of a life insurance policy. *Martin v. Stubbings*, 126 Ill. 387, 403.

If, however, it be held that the statutory provisions

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above referred to are not applicable to those companies, still defendant would be liable under those allegations of the third count which show that defendant collected from the Omaha Company \$2,000 to pay this particular certificate, and held it in trust for the beneficiary therein, and to be paid over to her upon compliance with the by-laws and constitution of defendant. The first count would also still be good if the statutory provisions above stated were not applicable, because it avers that the Omaha Company and the Chicago Company are one and the same, and were one and the same, and that their by-laws, constitution and certificate of membership were the same, and that they were controlled by the same persons. Under the allegations of that count, this was merely a change from doing business under a Nebraska incorporation to doing business under an Illinois incorporation.

We hold that the court erred in sustaining the demurrer to the declaration.

The judgment is therefore reversed and the cause remanded.

Reversed and remanded.

Frank Keenan, Appellee, v. John E. Drew, Appellant.

Gen. No. 4,974.

1. PLEADING—*when count in trespass sufficient after verdict.* Held, that the count in trespass for an illegal sale under execution in question in this case, was sufficient after verdict.

2. TRESPASS—*when officer selling under execution guilty of.* A constable who after levy sells the property levied upon after the same has been duly claimed as exempt, becomes guilty of a trespass.

3. EXEMPTIONS—*when description in schedule sufficient.* Held, that the jury were justified in finding that a field of corn claimed by schedule as exempt was the same field of corn that had been levied upon and sold.

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4. **EXEMPTIONS**—*effect of omission from schedule.* An omission of property from a schedule does not affect the right of the judgment debtor to claim that the included articles were exempt, unless the omission was fraudulent.

5. **EVIDENCE**—*when offer of proof insufficient.* An offer of proof must embody an offer to prove facts which will establish the legal claim or defense relied upon.

6. **DAMAGES**—*when exemplary should not be awarded.* Held, that under the facts of this case exemplary damages should not be awarded against a constable who had illegally sold exempt property.

Trespass. Appeal from the County Court of Lee county; the Hon. ROBERT H. SCOTT, Judge, presiding. Heard in this court at the April term, 1908. Affirmed upon remittitur. Opinion filed October 14, 1908.

Statement by the Court. In August, 1905, appellant, a constable of Lee county, received two executions against appellee, upon judgments rendered by a justice. Appellee caused a schedule to be prepared and presented to appellant under each execution within the time fixed by law. He therein described his personal property as four horses, valued at \$180; one buggy valued at \$10; one circular wood-saw valued at \$10; one set of double harness valued at \$5; thirty acres of growing corn, upon which there is a mortgage, value of crop unknown; one corn plow valued at \$1; cash on hand, none; and a debt of \$2.50, due appellee from John Lutgens. Appellant did not cause any appraisement to be made, but levied upon a field of corn which appellee owned, growing upon land he had leased from one Moriarity, and sold it at execution sale to one of the plaintiffs in execution for \$305. Thereafter appellee brought this suit against appellant, and filed a declaration containing four counts, to which appellant filed the plea of not guilty and following which there were numerous special pleas, special replications and special rejoinders. Upon the fourth trial appellee had a verdict and a judgment for \$305, from which defendant below prosecutes this appeal.

At the last trial appellee withdrew all counts of the declaration except the fourth, and it was agreed that the pleas should stand to that count. The fourth count was a general count in trespass, alleging that at the time and place in question appellant with force and arms, "took, drove and led away" thirty-five acres of standing corn of appellee, of the value of \$425, and converted and disposed of the same to his own use, to the damage of appellee. The special pleas set up the issuing and delivery of said executions to appellant as constable, and averred that he seized and took said goods and chattels of appellee in execution to make the money in said execution mentioned, as he lawfully might, said property being liable to be taken by virtue of said writs, which were in full force. The special pleas, replications and rejoinders, raised the issues whether appellee scheduled this field of corn, whether he described it with reasonable certainty in his schedule, whether it was liable to be seized and sold on said executions, whether appellant had a legal right to disregard the schedules and to levy said executions on said field of corn without appointing appraisers, whether appellee was entitled to select \$100 worth of property as exempt from levy and sale on said executions, and whether appellee fraudulently omitted to schedule a sum of money due him for oats sold Frank Hettinger.

C. L. & C. E. SHELDON and HENRY S. DIXON, for appellant.

BROOKS & BROOKS and J. W. WATTS, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

It is contended that the fourth count, the only one now remaining in the declaration, is so defective that it will not support a judgment. It is said that it is impossible that appellant "took, drove and led away"

thirty-five acres of standing corn. The words "drove and led away" may be disregarded. Appellant levied his executions upon a field of standing corn owned by appellee, and sold it at public sale. We think the allegation that appellant took this corn and converted it to his own use is sufficient after verdict. If the field of corn described in the schedule was that upon which the execution was levied, then appellant had no lawful authority to sell it without first causing it to be appraised and giving appellee an opportunity to make his selection therefrom. When he levied upon and sold this corn without causing an appraisal to be made, he became a trespasser, if this was the same corn described in the schedule, and in such case his executions did not justify him and he was liable to appellee in an ordinary action of trespass. As appellee did not seek to recover a penalty, the common form of a declaration in trespass was sufficient. *Pace v. Vaughn*, 1 Gilm. 30; *Cornelia v. Ellis*, 11 Ill. 585; *Amend v. Murphy*, 69 Ill. 337; *Race v. Oldridge*, 90 Ill. 250. When an officer sells property on execution before the time when the statute permits him to sell, he becomes a trespasser *ab initio*. *Camp v. Ganley*, 6 Ill. App. 499; *Barrett v. Bogardus*, 71 Ill. App. 407; 12 Am. & Eng. Ency. of Law, 2nd Ed. 252.

One of the issues was whether this was the field of corn which was scheduled and whether it was sufficiently described in the schedule. The description in the schedule was vague, as it did not locate the field in which the corn was growing. The proof showed that appellant and one of the execution plaintiffs measured the corn-field on the Moriarity farm, which was afterward sold, and found it to contain over thirty-five acres instead of thirty acres. The schedule said there was a mortgage upon the corn so scheduled. Appellant and the recorder searched the county records and did not find of record any mortgage upon this corn. Appellee's father had certain other land, known as the Haley land, rented, and appellant knew

that appellee worked other land besides the Moriarity land, and had seen him working on the land his father had rented, and knew he worked on the west eighty of the Haley land. In this state of the proof the court gave two instructions requested by appellee, which seemed to assume that the corn levied upon and sold was the corn scheduled, and also modified an instruction requested by appellant as to seem to make a like assumption. This language should have been more carefully guarded, but other instructions were explicit that if this corn was not scheduled, appellee could not recover, and the proof did not show that appellee owned any corn except this one field on the Moriarity land, and we conclude the jury could not have reasonably found that the schedule referred to any field of corn except that growing on the Moriarity land rented by appellee.

The court refused to permit appellant to prove that appellee's landlord issued a distress for rent, and that the purchaser of this corn at the execution sale paid the landlord \$250 thereon. The offer did not go far enough. If the offer had been to prove facts which gave the landlord a lien on this corn, the proof should have been admitted, as tending to limit and diminish the interest which appellee had in the corn, though not to establish a set-off. But there was no offer to prove such facts as would give the landlord a lien.

The court sustained an objection to an offer by appellant to prove that appellee had delivered certain oats at Hettinger's elevator before this schedule was made, and that they had not been paid for and were worth \$94.82, and that appellee either owned the oats or had a claim against Hettinger for their value when the schedule was made, which did not include them; and "that said oats had been fraudulently concealed from the judgment creditors". The omission of property from the schedule did not deprive appellee of his right to claim his exemptions out of the articles named in the schedule, at least unless said omission was

fraudulent. *Berry v. Hanks*, 28 Ill. App. 51; *Horton v. Smith*, 46 Ill. App. 241. Moreover, the principal of the two executions was but \$108.69, and the costs were slight, while appellee scheduled property valued at over \$200, besides this corn which sold for \$305; so that he scheduled property worth about \$500. He was a single man, and entitled to select but \$100 from this property as exempt. It is not easy to see therefore how the failure to schedule the oats or money at Hettinger's could have been fraudulent. While appellant offered to prove that these oats or this money had been "fraudulently" concealed, he did not offer to prove any facts which would tend to establish a fraudulent concealment. As no competent specific evidence of fraud was offered, the question whether proper proof should have been received, if offered, and whether the fraudulent concealment of property from a schedule will invalidate a schedule as to the property named therein, is not preserved for review. *Goodrich v. City of Chicago*, 218 Ill. 18.

We, however, conclude that the judgment is excessive. No fact appears which would justify vindictive damages. Appellee was only entitled to compensation for the wrong done him in not permitting him to make his selection out of this field of corn. The purchaser paid \$305 for it, and the proof is that 962 bushels of corn were taken from the field, worth in the field from \$259 to \$288. But if proper appraisalment had been made, appellee could only have selected and claimed as exempt \$100 worth of this corn. The cases relied upon by appellee are mainly where the specific property levied upon was exempt. This corn was not specifically exempt, but appellee was entitled to \$100 worth therefrom, and was only deprived of that amount. Under these circumstances we fail to see why he should be allowed to recover the entire value of the property. To illustrate the injustice of this recovery, let us suppose that the executions were much larger and that the property was worth \$10,000, and

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that from it the debtor was entitled to select \$100 worth, and was deprived of that right by the failure of the officer to have the property appraised and to permit him to make his selection of \$100 worth. It would shock the sense of justice of any reasonable man to permit the debtor in such a case to recover \$10,000 from the officer, when he had only been deprived of \$100.

This opinion will be lodged with the clerk, and counsel for both parties will be notified thereof. If, within seven days, appellee files a *remittitur* of all the principal of said judgment except \$100, it will be affirmed at the sum of \$100 and the costs of this court will be adjudged against appellee. If such *remittitur* is not filed the judgment will be reversed and the cause remanded.

Affirmed upon remittitur.

Thereafter appellee filed a *remittitur* of all said judgment except \$100. The judgment is therefore affirmed in the sum of \$100. The costs of this court are adjudged against appellee.

**Thomas N. Langan, Appellee, v. Milk's Grove Special
Drainage District No. 1, Appellant.**

Gen. No. 4,995.

1. **DEMURRER**—*when does not sufficiently rely upon Statute of Limitations.* A demurrer does not sufficiently rely upon the Statute of Limitations where it alleges that "it does not sufficiently appear from said petition * * * that the petitioner is not now barred by the Statute of Limitations from demanding the relief prayed for"; it is essential that the demurrer set up that the petition demurred to shows that the action is so barred.

2. **MANDAMUS**—*nature of action.* *Mandamus* is an action at law and is governed by the same rules of pleading that are applicable to other actions at law.

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3. **MANDAMUS**—*how defense of Statute of Limitations must be made.* To a petition of *mandamus* the Statute of Limitations must be specifically pleaded; it cannot be raised by demurrer to the petition.

4. **MANDAMUS**—*when laches not defense.* *Laches* short of the statutory period of limitations is no defense to an action of *mandamus*.

5. **MANDAMUS**—*when demand upon drainage district sufficient.* *Held*, that the demand averred in this case upon the drainage trustees, to alter, repair and modify the drainage district was sufficient.

6. **DRAINAGE**—*what not required of dissatisfied landowner.* A landowner demanding of drainage trustees that the district be repaired, altered or modified is not required to do the surveying and civil engineering necessary to determine just where the difficulty lies or just how much or kind of repairs would be sufficient to give the proper outlet insisted upon.

THOMPSON, P. J., dissenting.

Mandamus. Appeal from the Circuit Court of Iroquois county; the Hon. FRANK L. HOOPER, Judge, presiding. Heard in this court at the April term, 1908. Affirmed in part and reversed in part. Opinion filed October 23, 1908.

Statement by the Court. Thomas N. Langan filed a petition against Milk's Grove Special Drainage District No. One of the towns of Milk's Grove and Chebanse, in Iroquois county, praying for a writ of *mandamus* to compel the commissioners of said district to alter, repair and modify the drainage system of said district and to deepen and widen the main ditch between certain points specified and to deepen and widen two certain lateral ditches across the lands of the petitioner and to the place where they emptied into the main ditch, so as to provide an outlet of ample capacity to carry the water off the petitioner's land and to drain the same so that petitioner's land would receive the protection and benefit contemplated when the district was organized and when the lands were classified, and that they make a special assessment to meet the cost thereof. The district filed a general and special demurrer to said petition, which was overruled. The district elected to abide by its

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demurrer and there was a judgment awarding a writ of *mandamus* substantially in the terms of the prayer of the petition. This is an appeal by the district from that judgment.

The petition stated that the district was organized February 26, 1885, under the Farm Drainage Act of 1879, for the purpose of constructing, repairing and maintaining drains, embankments and grades within said district for agricultural and sanitary purposes, by special assessment upon the property benefited thereby. An exhibit attached to the petition and made a part thereof contained a plat of the district and gave the classification of each forty-acre tract therein. The petition stated that the petitioner owned section 35 in township 29 north and of range 10, east of the third principal meridian, at about the center of said drainage district. From the plat it appears that he owned nearly one-twelfth of the lands of the district. The petition stated that the district adopted a system of drainage and built one main drain extending from the south end of petitioner's land through the lower part of the district and to an outlet in Langham Creek, at the southeastern part of the district, and constructed laterals emptying into said main ditch, and among them two lateral open ditches crossing petitioner's land from higher land. The petition showed that assessments had been made against the petitioner for over one-sixth of the entire cost of the work done, and that all said assessments were paid when due, besides several later assessments in repairing and maintaining the drainage system. The petition stated that the whole of said section 35 is level land and that the central portion of it is low; that the purpose of said assessments was to furnish petitioner an outlet into which he might drain the waters off of his land and to carry off the waters brought upon his land by said two lateral ditches crossing his land from other lands above. The petition stated that said main ditch was not so constructed as to furnish an outlet for the

water on petitioner's land and for the waters brought upon his land by said lateral ditches; that the waters brought upon his land by said lateral ditches came from lands the surface of which is higher than petitioner's land; that, owing to the narrowness and shallowness of the main ditch from the south part of petitioner's land to said creek, the waters brought upon petitioner's land by said two lateral ditches remain upon petitioner's land for such a length of time as to destroy petitioner's crops and grain grown on said lands to the amount of several thousand dollars each year; that this is caused by the narrowness, shallowness and incapacity of said main ditch running from the south part of said petitioner's land to said creek; that said main ditch from petitioner's land to the creek, by reason of error in the construction of the same, completely fails to furnish an outlet for the drainage of petitioner's land and for carrying off the water brought upon said petitioner's land by said two lateral ditches, and completely fails to furnish an outlet for the drainage of petitioner's land as was originally contemplated by the construction of said drainage ditch, and that it is of little or no value to the petitioner for any purpose. The petition also alleged that the said two lateral ditches were constructed too narrow and too shallow through petitioner's land to carry off from petitioner's land and into the main ditch the water which the said two lateral ditches brought upon said land from lands above. The petition stated that if the main ditch was deepened and widened from a point where it crosses the east line of Milk's Grove township up to a point where the said two lateral ditches connect with the main ditch in the south part of petitioner's land (which would be apparently about the upper one-third of the length of the main ditch), and if said two lateral ditches were deepened and widened from the place where they emptied into the main ditch up through petitioner's land to his west line, a complete outlet would be fur-

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nished, as petitioner is informed and believes, to the drainage of petitioner's land and for carrying off the water brought upon his land by said two lateral ditches. The petition further stated that at the time it was filed from the point where the two lateral ditches connect with the main ditch to where the main ditch intersects the east line of Milk's Grove township, being about 10,700 feet in distance, there is a fall of about eight feet in the bottom of the ditch, and that said ditch could be deepened and widened sufficiently to give petitioner a complete outlet and carry off the water from petitioner's land and the waters of said two lateral ditches, without interfering with the flow in the main ditch, and that an average fall of one foot for said distance would be amply sufficient to carry off said water. The petition further stated that, if the main ditch was so deepened and widened as to furnish a complete outlet as aforesaid, there would be an average fall in the bottom of said two lateral ditches of at least three feet, while an average fall of one foot would be sufficient. The petition further stated that in 1905 the district deepened and widened one of said lateral ditches, so as to cause more water to be brought upon petitioner's land and to increase the already overtaxed capacity of the main ditch, commencing at the south part of petitioner's land, and to cause more water to be brought in to stand on petitioner's land. The petition further stated that the cost of modifying and changing the main ditch from the east line of Milk's Grove township and deepening and widening it to where the two lateral ditches connect with it in the south part of petitioner's farm, being a distance of about 10,700 feet, and deepening and widening the two lateral ditches from the place where the same empties into the main ditch in the south part of petitioner's land up to the point where they intersect the west line of petitioner's land, being a distance of about 2,000 feet, would be approximately \$8,000. The petition further

stated that the benefits accruing to the several tracts of land in said district, except petitioner's land, far exceed the several assessments levied against the same; that there is no money in the treasury of the district; that it will be necessary to make an additional levy to raise the amount necessary to modify the drainage system so as to drain the land of petitioner and to carry off the water brought upon petitioner's land by said two lateral ditches as contemplated in the organization of said district and the classification of said lands; that the benefits accruing to the several tracts of land in the district will far exceed the amount of the assessments made in completing the district, including the necessary change; that the petitioner has often requested the drainage commissioners and their predecessors in office to deepen and widen said main ditch from the east line of Milk's Grove township up to and into the south part of petitioner's land, and to deepen and widen said two lateral ditches from where the same empty into the main ditch in the south part of petitioner's land up to where they intersect the west line of petitioner's land, so that he might have an outlet to drain his land and to carry off the water brought thereon by said two lateral ditches, and might receive the benefits contemplated by the organization of said district and construction of said drainage ditch, but they have refused and neglected so to do.

A. F. GOODYEAR, for appellant.

T. W. SHIELDS, J. H. CAREY and FRANK J. BURNS, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

It is urged that the demurrer should have been sustained on the ground that some statute of limitations is a bar to this proceeding. All that the special demurrer contains on that subject is as follows:

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"It does not sufficiently appear from said petition * * * 8. That the petitioner is not now barred by the Statute of Limitations from demanding the relief prayed for."

This is not equivalent to saying that the petition shows that the suit was barred, but only that the petition does not show that the action is not barred. In a common law pleading the pleader is not bound to notice or guard against the Statute of Limitations in stating his cause of action. But if the ground of demurrer alleged had been that the petition affirmatively showed that the Statute of Limitations had run against the cause of action, yet that ground of demurrer would not be well taken for two reasons.

1. This is an action at law and it is governed by the same rules of pleading that are applicable to other actions at law. *Cleary v. Hoobler*, 207 Ill. 97; *Mayor of Roodhouse v. Briggs*, 194 Ill. 435; *People v. Board of Trade*, 193 Ill. 577; *Chicago Great Western Railway Company v. People*, 179 Ill. 441. In the case last cited it was said: "*Mandamus* is a common law action and in the circuit court is governed by common law rules as to pleadings." Such also is the statute. Revised Statutes, chapter 87, section 4. In 1 Chitty's Pleading 496, the rule is stated: "It is always necessary to plead the statute of limitations specially." In *Gunton v. Hughes*, 181 Ill. 132, it is held that at law a defendant cannot avail of the Statute of Limitations by demurrer, even if it appears on the face of the pleading that the time fixed as a limitation has expired, but he must plead the statute specially and give the plaintiff the opportunity to reply any special matter which prevents the bar from attaching. *Wall v. C. & O. R. R. Co.*, 200 Ill. 66, is to the same effect.

2. The petition shows that the district deepened and widened one of the lateral ditches across petitioner's land in 1905 and thereby increased the flow of water from the lands above to and upon petitioner's land, and that the same would stand there for

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lack of sufficient width and depth of the main ditch from the south part of petitioner's land for about 10,700 feet to the east line of Milk's Grove township, over which distance a fall of eight feet permits complete relief to be given to petitioner. It is not claimed that any Statute of Limitations has run since 1905 and therefore the Statute of Limitations is not a defense under a demurrer confessing the foregoing allegations.

Laches was alleged as a ground of special demurrer. We are of opinion that what was last above said disposes of that defense.

It is insisted that there is not sufficient allegation of a demand. Almost the same language upon that subject used in this petition was used in the petitions in *Peotone Drainage District v. Adams*, 163 Ill. 428, and *Kreiling v. Nortrup*, 215 Ill. 195, and they were there treated as sufficient.

The chief objection urged to the petition is that it is too indefinite. If the contentions of the district in that respect are sustained it would be necessary for the petitioner to employ a surveyor, have a survey made of the main ditch for the 10,700 feet thereof from the south part of his land to the east line of Milk's Grove township and of said lateral ditch for the 2,000 feet thereof through his land and cause profiles thereof to be made showing the width, depth and fall of said main ditch and said lateral ditch within said limits, and to file with the petition a profile thereof, and also to cause a surveyor or civil engineer to make estimates and draw profiles showing how deep and how wide and at what grade of descent said ditches should be in order to give petitioner an outlet for the waters from his land and for the waters brought upon his land by said two lateral ditches. It would then be necessary for the petitioner to amend his petition and set up and allege all said facts and details so as to furnish the district with full information as to the manner in which they can make the

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drainage ditches accomplish the duty intended. The act under which this district was organized was repealed by the act in force July 1, 1885, but the district was continued in existence under and subject to the provisions of said later act. Cleary v. Hoobler, *supra*. Section 41 of said act of 1885, as amended in 1901, enacted that after the completion of the work the commissioners of the district shall keep the same in repair, and if the lands of the district are not drained as contemplated or they receive partial or no benefit, the commissioners shall use the funds of the district to carry out the original purpose, to the end that all the lands so far as practicable shall receive the benefits contemplated when the lands were classified, and if sufficient funds are not on hand the commissioners shall make a new tax levy. There is nothing in this to imply that the dissatisfied landowner must do the surveying and civil engineering necessary to determine just where the difficulty lies and just how much and what kind of repairs would be sufficient to give the proper outlet. An imperative duty seems by this statute to be imposed upon the drainage district, when it is ascertained that certain lands within the district are not drained when they have been classified as to be benefited by the ditches of the district, to take the initiative and give the landowner the required relief. This duty was expressed in the opinions in Peotone Drainage District v. Adams, 61 Ill. App. 435, and 163 Ill. 428. It seems most in harmony with the spirit of said amended section 41 of the Farm Drainage Act to hold that all the landowner needs to show is that his lands have been classified as to be benefited and have been assessed and that he has paid the assessment, and that his lands have not been drained, and to show reasonable ground for believing that the ditches and drains of the district can be so repaired as to give him the drainage contemplated by the organization of the district and the classification of his lands. Here the petition shows that in a dis-

tance of 10,700 feet from the south part of petitioner's land there is a fall of eight feet, and that a fall of three feet in that distance in a ditch properly widened and graded at the bottom would drain petitioner's land. It would seem burdensome to cast upon the landowner the civil engineering duties here called for. The district would not be bound to repair the ditches in the precise manner so suggested by the petitioner, unless indeed the judgment in *mandamus* so commanded, and the expense thus incurred by the landowner would very likely be lost. It seems to be the policy of the law to leave in the authorities of such a district a considerable discretion as to the precise manner of carrying out the details of such an improvement which may vary as conditions develop in actually doing the work. The judgment usually only commands the district to produce the result of relieving the land. In *Peotone Drainage District v. Adams, supra*, there was indeed in the amended petition some attempt to indicate what might be done by way of changing the underground tile drain there in question so as to relieve petitioner's land, but as that tile drain was underground and out of sight, it is obvious that the allegations of that petition on that subject must have been largely matter of opinion. The amended prayer of the amended petition in that case only asked that the drainage commissioners be commanded "to alter, repair and modify said drainage system so as to provide an outlet of ample capacity to the end that your petitioner's said land shall receive the protection and benefit contemplated when said drainage district was organized and the said lands were classified, and that they make a special assessment to meet the cost thereof." The judgment of the court was in substantially the same words. It commanded the commissioners so to repair and modify the drainage system as to give the landowner adequate drainage, but how the previous work should be changed to accomplish that result was left to the com-

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missioners. If therefore such a prayer and such a judgment are proper and sufficient, it would seem unnecessary for the landowner in his petition to set out details which were not to be incorporated in the judgment. In *Kreiling v. Nortrup*, *supra*, the petition, the prayer and the judgment seem to have been substantially like those in the case before us, and the judgment was affirmed. True, that petition was not tested by a demurrer, but the two cases just cited seem to indicate the proper pleading and practice in such case. If so, this petition is not subject to the charge of being too indefinite.

One sentence in said petition states that if said main ditch and two lateral ditches be deepened and widened within the limits already stated, a complete outlet would be furnished for the drainage of petitioner's land and for carrying off the water brought thereon by said two lateral ditches, "as your petitioner is informed and believes." That sentence does not aid the petition, for the allegations of a common law pleading must be positive and are not permitted to be made upon information and belief. It is argued that the entire petition is bad because of the words just quoted. An examination of other parts of the petition show that the same charge is elsewhere substantially alleged without that qualification. The allegations that the fall from the south part of the petitioner's land to the east line of Milk's Grove Township, a distance of about 10,700 feet, is about eight feet, and that said main ditch can be deepened sufficiently to give petitioner a complete outlet and carry off the water from petitioner's land and from the two lateral ditches without interfering with the flow in the main ditch, and numerous like allegations, are positively alleged and as positively admitted by the demurrer. The presence therefore of a single allegation in a single sentence based only upon information and belief is not sufficient to render the pleading obnoxious to the demurrer.

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The judgment includes an order for an execution against the drainage district. The district is a quasi-municipal corporation, and the commissioners are sued only in their official capacity, and it was error to award execution. That part of the judgment must be reversed, but as no point was made upon it by appellant, such partial reversal should not carry costs in this court. The order for execution is reversed and in all other respects the judgment is affirmed at the costs of the district, without execution.

Affirmed in part and reversed in part.

Mr. Presiding Justice THOMPSON, dissenting.

The only question before this court is the sufficiency of the petition. The demurrer is special and general. The petition nowhere gives the dimensions or particular description of the main ditch or the two lateral ditches which the petitioner desires to have enlarged and deepened nor does it state how much any of the ditches are to be deepened or widened. Neither does the petition state in positive terms that the changes desired will be of any benefit. The statement of the petition is that if the ditches be deepened and widened between certain points "a complete outlet will be furnished as your petitioner is informed and believes to the drainage of your petitioner's land and for carrying off the water brought on by the two lateral ditches." Counsel for petitioner rely on the cases of Peotone & Manteno Union Drainage District v. Adams, 61 Ill. App. 435, affirmed in 163 Ill. 428, and Kreiling v. Nortrup, 116 Ill. App. 448, affirmed in 215 Ill. 195, as authority for the sufficiency of their petition. The language and statement of facts of the petition in this case and in the case of 61 Ill. App. are somewhat similar but in the case at bar the petition lacks the certainty and completeness of the statement in the case relied on. It should be observed however that in the two cases relied upon issues were joined and trials had on the issues. The suf-

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ficiency of the petitions was not raised in either case by demurrer. In the Peotone case the petition had attached a "plat of the district together with a profile of the contemplated improvements which showed the drainage that was claimed to be insufficient," and the court said that "A map or profile, marked exhibit 'C' with his petition indicates the character and change necessary to give the petitioner the outlet which in his judgment was proper and right; and that it would cost \$150 to make the change." In that case it was clearly shown what change the petitioner sought to compel the district to make. In the present case no facts are alleged as to the desired change except that the change required is the deepening and widening of ditches that will "cost approximately \$8,000" and is to extend over two miles in length along the main ditch in which there is a fall of eight feet and along the lateral ditches across petitioner's land. There is no statement that, if the \$8,000 should be assessed, raised and expended, it would be of any service. All the petitioner states is that "a complete outlet will be furnished as petitioner is informed and believes."

"The writ of *mandamus* will not be awarded in any case unless the relator shows a clear legal right to have the thing done, and in the manner asked." "It will never be ordered in a doubtful case." "Every material fact necessary to show the plain duty of the respondent to act in the premises must be set forth by a party seeking to compel the performance of an act." "The burden is always on the relator to clearly establish the right sought to be enforced." *Swigert v. Co. of Hamilton*, 130 Ill. 538; *Cristman v. Peck*, 90 Ill. 150; *Gormley v. Day*, 114 Ill. 185; *People v. Mayor*, 51 Ill. 27; *People v. Town of Mount Morris*, 145 Ill. 430; *Gunning v. Sheahan*, 73 Ill. App. 118. It is the duty and obligation of the commissioners to provide ample drainage for assessed land in the district. *Binder v. Langhorst*, 234 Ill. 583. On the facts stated in the petition, if the enlargement of the

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ditches desired will furnish the relief appellee desires he is entitled to the writ of *mandamus*. Bromwell v. Flowers, 217 Ill. 174. It is however necessary that the petition should state in such form as to be issuable that the work the district was sought to be made to perform, *prima facie*, would accomplish the desired object. The petition should allege the facts which petitioner would be required to prove to sustain it. I am of the opinion that the petition was insufficient in not showing with reasonable certainty the specific improvements or changes that were desired, and that such changes would accomplish what petitioner was entitled to. The appellant should not be required to raise and expend \$8,000 as an experiment without a positive statement from some person that it will be beneficial. I think the demurrer should have been sustained with leave to the petitioner to amend if he desired.

**Corning & Company, Appellant, v. Peoria & Pekin
Union Railway Company, Appellee.**

Gen. No. 4,996.

1. **INSTRUCTIONS—when giving of peremptory saved for review.** The question whether the court erred in instructing the jury to find the issues for the defendant is saved by an exception to the giving of such instruction in the bill of exceptions without the interposition of a motion for a new trial.

2. **COMMON CARRIERS—obligation of, safely to transport.** When goods have been delivered to a carrier to be carried and delivered to a certain person at a certain destination, the carrier is an insurer for the safe delivery of the goods to the person to whom they are consigned.

3. **COMMON CARRIERS—when liability does not attach.** The liability of a common carrier attaches by virtue either of full delivery of the merchandise to be transported or by acceptance of such merchandise by the carrier.

4. **COMMON CARRIERS—when delivery of merchandise not shown.**

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Held, under the facts of this case, that there was neither delivery of merchandise to the carrier nor acceptance thereof by the carrier and that the common law liability of the carrier did not attach.

Assumpsit. Appeal from the Circuit Court of Peoria county; the Hon. NICHOLAS E. WORTHINGTON, Judge, presiding. Heard in this court at the April term, 1908. Affirmed. Opinion filed October 14, 1908.

Statement by the Court. On June 4, 1904, the Peoria & Pekin Union Railway Company placed Illinois Central box car No. 16223 on a spur track next to a platform on the outside of a warehouse operated by the Corning Distilling Company of the city of Peoria. The Corning Distilling Company loaded the car that afternoon with sixty-six barrels of alcohol, whiskey and cologne spirits, the property of Corning & Company, a corporation engaged in rectifying spirits, whose place of business was some 1200 feet away. The loading was finished about 2:30 p. m. and the car was sealed by the Distilling Company. At about four o'clock that afternoon and before the car had been removed, an explosion took place in another warehouse of the Distilling Company, next to that from which this car had been loaded, and a wall of said last mentioned warehouse fell across said spur track so that an engine could not go in to haul out said car. A fire immediately broke out in the warehouse, and this car and its contents were consumed.

This is an action by Corning & Company for the use of the Liverpool & London & Globe Insurance Company of London, England, and for the use of the Norwich Union Fire Insurance Company, of Norwich, England, against the Peoria & Pekin Union Railway Company, to recover the value of the contents of said car. A declaration was filed containing two special and two common counts. Plaintiff afterwards dismissed the two common counts. The first special count averred that plaintiff delivered said goods to defendant, a common carrier, and the defendant received the same to be taken care of and safely car-

ried from said spur track to plaintiff's warehouse adjacent to one of the defendant's tracks in the city of Peoria to be there safely delivered by defendant to plaintiff; that in consideration of a certain reward to defendant it promised plaintiff to take care of said goods and safely carry them to said place and there deliver them to plaintiff; and that, though defendant as such carrier received said goods for said purpose, yet it did not take care of or safely carry them or deliver them to plaintiff, but behaved so carelessly in that respect that by defendant's mere negligence and improper conduct said goods were wholly lost to plaintiff. The second count was shorter but similar in its charges, save that it alleges a promise by defendant to deliver the goods to plaintiff within a reasonable time and that a reasonable time had elapsed but defendant did not safely carry said goods to the warehouse of Corning & Company, nor there deliver the same to plaintiff, whereby the goods were lost to plaintiff. Defendant pleaded the general issue. At the close of all the proofs, the court, on motion of defendant, directed the jury to find the issues for defendant. Such a verdict was returned and defendant had judgment thereon. This is an appeal from said judgment.

F. H. TICHENOR and BARGER & HICKS, for appellant.

STEVENS & HORTON, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Plaintiff did not move for a new trial. Those questions which require to be first presented to the court below by motion for a new trial before they can be availed of on appeal are not preserved for review by this record. The question whether the court erred in instructing the jury to find the issues for the defendant is saved by an exception to the giving of such instruction in

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the bill of exceptions, without the interposition of a motion for a new trial. I. C. R. R. Co. v. O'Keefe, 154 Ill. 508.

When goods have been delivered to a carrier to be carried and delivered to a certain person at a certain destination, the carrier is an insurer for the safe delivery of the goods to the person to whom they are consigned. Pacific Express Co. v. Shearer, 160 Ill. 215. The liability of the carrier is fixed by accepting the property to be transported. If the goods are placed in his car without his knowledge or acceptance or that of his agent, he is not liable as a common carrier. If the owner or person having the custody of the goods to be shipped never parts with their possession or does not place them under the control of the carrier there is no bailment, and no liability as common carrier is incurred. I. C. R. R. Co. v. Smyser & Co., 38 Ill. 355; Pratt v. Grand Trunk Ry. Co., 95 U. S. 43. Where a car had been furnished by a common carrier and loaded with hay, but the shipper requested that it be not forwarded until he had seen the consignee, and while so delayed the hay was destroyed by fire, it was held that the railway company was not liable as a common carrier, because the liability of a common carrier does not attach until the delivery to him of the property is complete. St. L., A. & T. H. R. R. Co. v. Montgomery, 39 Ill. 338. The material question here is whether the goods in question had been delivered to defendant and accepted by it for transportation before the fire.

There is very little controversy about the material facts. The car in question had been ordered the night before, and had been set in by defendant on said spur track on the day of the fire and before 12:30 P. M. But the car had not been ordered of defendant. The car had been ordered by the Distilling Company from the Illinois Central Railroad Company, and then the Distilling Company had requested defendant to get said car from the Illinois Central and place it on said

spur track. The defendant furnished to its shippers blanks known as "form 200" for use by them whenever they had cars to be shipped out. Said blanks were in three parts, the first, to be filled out and signed by the shipper, giving directions where the car should be delivered and what its contents were; the second part containing an order to the switching crew to be signed by the agent of the company; and the third part a receipt for the car, to be signed by the consignee. On or before 12:30 p. m. of that day, a clerk of the Distilling Company filled out the first part of one of these blanks and signed it in the name of the Distilling Company, thereby directing defendant to deliver Illinois Central car No. 16223, contents whiskey, from Corning Distilling Company to Corning & Company, and charge switching to Corning & Company. This clerk departed from the warehouse at about 12:30 leaving this switching order for delivery to defendant's messenger boy whenever he should come. At that time the Distilling Company had not commenced to load the car. That work began after one o'clock p. m. Between two o'clock and two thirty p. m. Moran, defendant's messenger boy, came to the warehouse of the Distilling Company and asked if they had any switching orders, and a clerk delivered this order to him, and he detached the order and tacked the rest of the form upon the side of the car furthest from the platform. No one testifies that the loading of the car was then completed. The clerk who delivered the order to him testified that he did not know whether the car was then loaded or not, and that that had nothing to do with the delivery of the order. When all of Moran's testimony is read from the record it will be found that he testified that the loading of the car was not yet finished; that the men were at work upon the platform; and that when he tacked the card on the other side of the car the door on that side was closed, but he heard the men at work in the car. The officers and agents of plaintiff, as well as the of-

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ficers and agents of defendant, testified that this order would have been delivered to Moran at any time after it was made out if he had called, and that the delivery of the order to Moran did not mean that the car was loaded and ready to be taken away. It was the custom of defendant to do the afternoon switching in that vicinity between four and six o'clock p. m. This was partly for the convenience of defendant and partly for the convenience of the Distilling Company and other shippers, as their cars were usually not loaded and ready to go out earlier than those hours. The loading of this car was finished about two thirty p. m. and the Distilling Company then sealed the car. The explosion and fire was about four o'clock p. m. The switching order had to go to what was called the junction office of defendant, where, if the order for shipment was accepted, it was put on the list for the shipping crew that afternoon. In this particular case another thing remained to be done before defendant would determine to move the car as requested by the shipping order. Where it received a car from another railroad to be placed at a warehouse for loading, if it received an order to ship such loaded car back to the same railroad, it would obey that order without any further directions. But if it had orders to ship that car to some other railroad or place than the railroad from which the car came, then the junction office, upon receiving the switching order, would apply to the railroad company which had furnished the car to ascertain if it consented that its car should be sent to this different destination. In this case, in the regular course of business, when the switching order reached the junction office, the chief clerk there or his assistant would call up the Illinois Central office by telephone and ask if it consented that this car of liquor be delivered to Corning & Company at its warehouse and, if the Illinois Central made a negative answer, then defendant would not accept nor execute the switching order. If the Illinois Central consented,

then defendant would accept the order and enter it on its books and place it on the list of work to be done by the switching crew that afternoon. The propriety of such a custom and usage is obvious. Otherwise the Distilling Company might have used this car for a different purpose from that for which it was obtained from the Illinois Central, without the knowledge or consent of the Illinois Central, and without paying for its use. When Moran received this switching order he did not immediately return to the junction office, but called upon other shippers to see if they had orders to take out cars that afternoon. He had not reached the junction office with this order when the explosion and fire occurred. The junction office had therefore no notice that the Distilling Company wished them to ship out that car that afternoon, and had no notice that the car was not to be returned to the Illinois Central, and defendant had not applied to the Illinois Central to know whether it consented to such a movement of its car, and that consent had not been obtained, and the things had not yet been done which were essential before defendant could accept the order to move the car.

It is contended that this evidence relative to the custom of obtaining the consent of the Illinois Central before turning the car over to some other destination was incompetent, because it was not shown that the shipper knew of the custom. Plaintiff had alleged that it had caused these goods to be delivered to defendant and that defendant had accepted them for transportation. The issue was whether the goods had been delivered to and accepted by the defendant for transportation, and plaintiff had to prove that. If some fact existed, because of which defendant was not at liberty to take the car away until another order had been obtained from the Illinois Central, then defendant had not yet received the goods for transportation, and the knowledge of that fact by the shipper was not essential.

Under all the facts above stated we conclude that the liability of defendant as a common carrier had not attached. The making out of the switching order was before the goods were loaded. The delivery of the switching order to the messenger boy was before the loading was completed, and the car could not have been removed at that instant. The messenger had no authority to accept goods for shipment. After the loading was completed the shipper gave no notice to defendant that the car was ready. It was the intention of both parties that the shipping order only meant that the car would be loaded during the afternoon and would be ready to be taken out between four and six o'clock P. M. It may be that, if this had been a car owned by defendant, or which it had procured and placed on that spur track for loading, defendant's liability as a common carrier would have attached when the loading was completed and the car sealed, without any other notice to defendant that the car was ready. But certainly that cannot be true where defendant did not procure the car, but the shipper did, and where the usage of the business would not permit defendant to take the car to any other destination than that from which it had received it without another order from the railroad company which owned the car, which order it had not received. Until this switching order had reached the junction office and it had obtained the consent of the Illinois Central that this carload might be taken to plaintiff's warehouse, defendant had not accepted the goods for shipment. If the Illinois Central had refused its consent, defendant would have refused to accept the shipping order and would not have been liable as common carrier.

Defendant also supports the judgment on other grounds, but we are of opinion that the court did not err in giving the direction to the jury, for the reasons above stated, and it is therefore unnecessary to discuss other reasons urged in support of the judgment. We hold that the evidence recited was competent. If

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any other evidence offered by defendant was improperly admitted, plaintiff was not harmed thereby, as the jury did not decide the questions of fact. For the reasons stated the judgment is affirmed.

Affirmed.

Union Brewing Company et al., Appellees, v. Interstate Bank & Trust Company, Appellant.

Gen. No. 5,005.

1. **NEGOTIABLE INSTRUMENTS**—*when part of signature surplusage.* A note signed in the name of a corporation by an individual as president will be deemed as only signed by such individual where the payee of such note knows that no such corporation exists and that the corporate name is only one assumed by the person signing as president for purposes of business convenience.

2. **PLEDGES**—*when collateral notes secure other indebtedness.* A collateral note signed by an individual under a fictitious corporate name is an individual obligation and, if it provides that it shall secure other indebtedness of the maker, it covers any other indebtedness due to the payee from the maker, and this notwithstanding such collateral note refers to the other liability by the word "ours."

3. **PLEDGES**—*when admission of partner by pledgor does not affect rights of pledgee.* The renewal of an old note is not a payment thereof and such a transaction effected after the admission of a partner by the pledgor does not affect the rights of the pledgee.

Bill of interpleader. Appeal from the Circuit Court of Peoria county; the Hon. NICHOLAS E. WORTHINGTON, Judge, presiding. Heard in this court at the April term, 1908. Reversed and remanded with directions. Opinion filed October 14, 1908.

Statement by the Court. On December 10, 1906, the Union Brewing Company and the firm of S. & A. Woolner filed their bill of interpleader against the Interstate Bank & Trust Company (hereinafter called the Trust Company), John G. Allen, as trustee in bankruptcy of E. Lewis Kelley individually and as sur-

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viving partner of George H. Simmons, late partners under the name of People's Savings Bank, and Arthur Tapping as administrator of the estate of said George H. Simmons, deceased. The bill set up that the Union Brewing Company on or about December 29, 1905, delivered its note, dated December 9, 1905, payable to People's Savings Bank one year after date, for \$9,472.32 with interest at six per cent. per annum from date until paid, which note was guaranteed by S. & A. Woolner; that said note is now due and complainants are ready to pay it, and it will greatly injure their financial credit if it is protested. The bill then set up that the Trust Company claims to hold and own said note as collateral security for various notes described, given by People's Savings Bank and George H. Simmons, who was engaged in business under said name of People's Savings Bank; that E. Lewis Kelley and George H. Simmons afterwards became partners as People's Savings Bank; that Simmons died February 6, 1906, and Arthur Tapping became administrator of his estate and claims that part of the proceeds of said note is due to him; that on February 9, 1906, bankruptcy proceedings were begun against Kelley and on February 25, 1906, he was adjudged a bankrupt, personally and as surviving partner of Simmons, and John G. Allen was appointed trustee in bankruptcy of said estate, and that said trustee claims to be the owner of said note. The bill asked that complainants be permitted to pay into court the money due on said note, and that the defendants interplead and settle their demands thereto, and that the defendants be restrained from suing or protesting the note. An injunction was issued upon complainants paying the money into court, and the several defendants filed answers setting up their respective claims. The Trust Company asserted that it held said note of the Union Brewing Company and S. & A. Woolner as collateral security for a note of \$5,000 due it from George H. Simmons under the name of People's Sav-

ings Bank, and also for several other notes for \$4,000, \$1,000, \$500 and \$2,500, signed by George H. Simmons by his own proper name. The cause went to a master, who took and reported the proofs with his conclusions that the Trust Company was entitled to be paid out of said fund one certain note of \$5,000, with interest, and that the rest of the fund was owing to the trustee in bankruptcy. The Trust Company filed objections because it was not held entitled to be also paid its other notes signed by George H. Simmons by his own proper name. These objections were overruled. They were renewed as exceptions before the court, and were overruled, and a decree was entered pursuant to the master's report. This is an appeal by the Trust Company from that decree.

Confusion was caused by the introduction in evidence of numerous other notes, which it is not now claimed are involved in this case, many of them of the same dates and amounts and between the same parties as the notes which are here in issue. We shall endeavor to refer only to those which we understand to be the subject of this suit. The transactions begin before the particular instruments described in the bill of complaint.

During the year 1905 George H. Simmons was president, and W. M. Wood was vice-president, and Peter Anicker was cashier of the Trust Company, which was engaged in a banking business. Prior to August 26, 1905, Jacob Woolner was the owner of a banking business in Peoria, which was conducted under the name of the People's Savings Bank. On that day he sold said business to George H. Simmons, and the latter took possession of the property and business on September 9, 1905. On September 15, 1905, Simmons borrowed \$5,000 from the Trust Company, and gave therefor a note of that date for that sum due ninety days after date, with interest at seven per cent. per annum, the rest of which note read as follows:

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“Having deposited with said bank as collateral security, for payment of this or any other liability or liabilities of ours to said bank, due or to become due, or that may be hereafter contracted, the following property, viz: Note, the Union Brewing Co., endorsed by S. & A. Woolner, and dated September 9th, 1905, for \$9,472.32, payable 3 months after date, with 6 per cent interest from date, to the People’s Savings Bank and endorsed by them, the market value of which is now \$9,472.32; with the right to call for additional security should the same decline; and on failure to respond, this obligation shall be deemed to be due and payable on demand, with full power and authority to sell and assign and deliver the whole of said property, or any part thereof, or any substitutes therefor, or any additions thereto, at public or private sale, at the option of said bank, or its assigns, and with the right to be purchasers themselves at such public or private sale, on the non-performance of this promise or non-payment of any of the liabilities above mentioned, or at any time or times thereafter, without advertisement or notice. And after deducting all legal or other costs and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales so to be made to pay any, either or all of said liabilities, as said bank, or its president or cashier, shall deem proper, returning the overplus to the undersigned.

PEOPLE’S SAVINGS BANK,
Geo. H. Simmons, Pres.”

At the same time Simmons delivered to the Trust Company the note pledged in the instrument just recited, being exhibit “3”, appearing on page 186 of this record, a note dated September 9, 1905, for \$9,472.32, with interest at six per cent. and containing a provision that it might be renewed for three months at maturity, signed by the Union Brewing Company, payable to the order of the People’s Savings Bank, and endorsed by S. & A. Woolner and by “People’s Savings Bank, Geo. H. Simmons, Pres.” At that time Simmons was indebted to the Trust Com-

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pany upon a note for \$4,000 with interest at the rate of six per cent., dated July 26, 1905, due one year after date and endorsed by Geo. H. Simmons, V. A. Goebels, D. S. Long, H. W. Danforth and Marcus Whiting. On December 1, 1905, Simmons became indebted to the Trust Company upon three other notes of that date, each due six months after date; one being exhibit "A3" on page 178 of the record, for \$1,000 with interest at five per cent., signed by G. H. Simmons and George B. Powell; another being exhibit "A7" on page 182 of the record, for \$2,500 with interest at five per cent., signed by G. H. Simmons and A. H. Thompson; and the third being exhibit "A8" on page 183 of the record for \$500 with interest at five per cent., signed by G. H. Simmons and P. L. Mounce. On December 14, 1906, Simmons renewed his note of September 15, 1905, for \$5,000 by giving another instrument of the same date and tenor as the one above set out, except that its maturity was eighty days after date, and with the same pledge, describing the same note for \$9,472.32. The signature was "People's Savings Bank, Geo. H. Simmons, Pres." as to the first \$5,000 note and pledge agreement above recited. On December 19, 1905, Simmons entered into a partnership agreement with E. Lewis Kelley, "to own the banking business and the building of the People's Savings Bank", and by that agreement Simmons agreed to transfer to Kelley a one-half interest in the building and the banking business of the People's Savings Bank. The note of the Union Brewing Company for \$9,472.32, of date September 9, 1905, and due in three months, which had been so assigned to the Trust Company as collateral security and which had been specifically described in each of the written pledges above recited, was past due when this instrument of December 14, containing the second pledge, was executed, but it had not then been renewed on account of the absence of one of the Woolners from Peoria. On December 29 or 30, 1905, the renewal of that note dated Decem-

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ber 9, 1905, payable one year after date to the order of the People's Savings Bank, for \$9,472.32, with interest at six per cent., signed by the Union Brewing Company and guaranteed by S. & A. Woolner, being exhibit "1" on page 184 of the record, was delivered to the Trust Company in lieu of and in substitution for the original note, exhibit "3", and the original note for \$9,472.32 of date September 9, 1905, being exhibit "3", was surrendered to the Union Brewing Company. Said note Exhibit 1 remained in the possession of the Trust Company at the time of the hearing and decree in this case.

It is the claim of the Trust Company that by the language of the first \$5,000 note of September 15, 1905, pledging said Union Brewing Company note as collateral, said last named note was held as security not merely for said \$5,000 note but also for said \$4,000 note due to said Trust Company, of date July 26, 1905, and that by virtue of the new contract and pledge embodied in the renewal note of \$5,000 of December 14, 1905, said collateral note was held as security not only for said \$5,000 note but also for said respective notes of Simmons of date July 26, 1905, for \$4,000, and for said three notes of December 21, 1905, for \$1,000, \$2,500 and \$500, respectively; and that when on December 29 or 30, 1905, the new Union Brewing Company's note for \$9,472.32, dated December 9, 1905, and due in one year, was substituted in lieu of the original pledge, it held said last named note as collateral security for all said notes of Geo. H. Simmons, and that too, although this last note pledged did not bear the endorsement of the People's Savings Bank or Geo. H. Simmons. The trustee in bankruptcy claims, and the master and the court held, that said pledges only secured notes held by the Trust Company signed by the name "People's Savings Bank," and did not secure the other four notes above recited, signed by Geo. H. Simmons by his own proper name, and that the surplus of the money in court, after satis-

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fying said one note of \$5,000 (upon which there was a small credit), was payable to the trustee in bankruptcy, who was trustee not only for Kelley individually, but also for Kelley as surviving partner of Simmons in the business conducted after December 19, 1905, by them as partners under the name of People's Savings Bank. Simmons died February 6, 1906, and his administrator claims that an interest in said last note of the Union Brewing Company, executed December 29 or 30, 1905, as of December 9, 1905, belongs to him as administrator, but his claim was ignored by the court and he has not assigned error.

JACK, IRWIN, JACK & MILES, for appellant.

MAPLE & LOVETT, for appellees; JOHN S. STEVENS, of counsel.

MR. JUSTICE DIBELL delivered the opinion of the court.

From September 9 to December 19, 1905, covering the time when the first \$5,000 note and the \$5,000 note in renewal thereof were executed in the name of "People's Savings Bank, Geo. H. Simmons, Pres." and delivered to the Trust Company, with the pledge agreement contained in each, George H. Simmons and he alone was doing business under the name of "People's Savings Bank." If any persons who dealt at that place of business believed it to be a corporation and were deceived thereby to their injury (as to which our attention is not called to any evidence in this record), it may well be that as between Simmons and such persons he would be estopped to deny the corporate character of the business. No such case is presented here. The vice-president and the cashier of the Trust Company were fully informed by Simmons before the Trust Company made this loan of \$5,000 to him, and again before the note was renewed, that he, and he alone, was doing business un-

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der that name. As between Simmons and the Trust Company the case stands exactly as if the instruments had been signed simply "Geo. H. Simmons." There was no corporation named "People's Savings Bank." Simmons was not president of any such corporation. These facts were well known to the vice-president and to the cashier of the Trust Company when they made this loan and when they renewed it. Those words in the signature were fictitious, or were assumed for business purposes, and were well known by said officers of the Trust Company not to represent any fact. The words "Geo. H. Simmons" in the signature were all that was actual and the officers of the trust company knew that fact when they accepted the paper.

The agreement to hold said note for \$9,472.32 as collateral security provides that it is held, not only for the payment of that note, but also as security for the payment of "any other liability or liabilities of ours to said bank due or to become due or that may be hereafter contracted." It also provides that when the collateral has been reduced to cash the Trust Company shall "pay any, either or all of said liabilities," out of the proceeds of said collateral. We fail to see how language could be employed to bind said collateral note more fully for all other liabilities which Simmons then owed the Trust Company or which he might thereafter contract with it. The word "ours" in the phrase "liability or liabilities of ours" is plural, it is true, but even if the People's Savings Bank had been a corporation, the singular number would have been the proper one to use unless the other liabilities were also intended to be secured. These words in the form are printed, and obviously the printed blank was so framed with the intention that it should be equally binding whether signed by one person or by more than one. We are of opinion that Simmons was the only signer of these notes and agreements pledging collateral, and that they secured all the notes

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which the Trust Company held against Simmons at the time they were executed. Such an agreement to secure not only a particular debt but also any and all undescribed indebtedness was supported in *Buchanan v. International Bank*, 78 Ill. 500; *Walker v. Abt*, 83 Ill. 226; and *Bartelott v. International Bank*, 119 Ill. 259.

The second pledge agreement had been executed and delivered by Simmons to the Trust Company before Kelley became his partner under the name People's Savings Bank. The indebtedness from the Union Brewing Company to Simmons under the name People's Savings Bank had therefore been pledged to the Trust Company for all of Simmons' debts to it before Kelley had acquired any interest in the assets of the business conducted under the name People's Savings Bank. The subsequent partnership gave him no interest in the debt so pledged, as against the claims for whose payment it was pledged. The fact that the note of the Union Brewing Company so pledged and deposited as collateral was afterwards renewed, and the time of payment extended, and the new Union Brewing Company note substituted for the one previously held in pledge, and that this substitution, though dated before the partnership, was not actually effected till after the partnership, does not alter the rights of the Trust Company. The debt which the Union Brewing Company owed had been pledged before Kelley went into the business, and the mere giving of a new note in substitution for the old did not pay the old debt nor create a new debt in which Kelley had an interest, as against the claims for which it had been pledged. Each pledge agreement expressly provided for substitutes for said original pledged note.

We are therefore of opinion that the Trust Company was entitled to a decree for the payment of all of its notes against Simmons out of the fund in court. Those debts exceed the amount of the fund pledged, and there would be no surplus for the trustee in bank-

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ruptcy. The decree is therefore reversed and the cause remanded to the court below with directions to enter a decree in conformity with this opinion.

Reversed and remanded with directions.

Frank Reidel, Appellee, v. Chicago, Rock Island & Pacific Railway Company, Appellant.

Gen. No. 5,009.

1. NEGLIGENCE—*how question to be determined.* If the testimony is conflicting the question of negligence is one of fact to be determined by the jury.

2. CONTRIBUTORY NEGLIGENCE—*when person struck by cars making flying switch not guilty of.* A laborer at work in private yards containing railroad tracks, is not under the same obligations with respect to keeping a lookout as is one employed in railroad yards where engines and cars are frequently moving about. In the former case the question of the exercise of ordinary care is one of fact for the jury.

3. EVIDENCE—*who competent to testify to matter of speed.* Sufficient experience qualifies a witness to testify to the rate of speed at which a string of cars was moving; expert evidence is not essential.

4. EVIDENCE—*when testimony as to failure to ring bell competent, notwithstanding no such allegation is contained in the declaration.* Notwithstanding the declaration does not charge failure to ring a bell, it is competent to show the failure of the railroad company to ring a bell or blow a whistle as bearing upon the question of the exercise of due care by the plaintiff.

Action in case for personal injuries. Appeal from the Circuit Court of La Salle county; the Hon. R. M. SKINNER, Judge, presiding. Heard in this court at the April term, 1908. Affirmed. Opinion filed October 14, 1908.

Statement by the Court. On October 27, 1905, Frank Reidel, the appellee, was at work assisting in moving some empty box cars in the yards of the German-American Portland Cement Works, near La-Salle, and walking between two switch tracks, when

he was struck by a corner of a loaded coal car at the head of a string of cars which were making a flying switch into said yards without an engine attached. He was knocked across another switch track and against a warehouse, and became unconscious and received severe injuries. Said flying switch was made by a switching crew in the employ of the Chicago, Rock Island and Pacific Railway Company, appellant; and under a contract between the cement company and appellant said switch tracks were in the exclusive direction and control of the appellant while the same were in use in placing cars thereon or taking cars therefrom. Appellee sued appellant for injuries so received, and filed a declaration, the sufficiency of which to meet the proofs and support the verdict is not questioned. Appellant filed the general issue. The Cement Company was also originally a defendant. Afterwards the suit was dismissed as to the Cement Company. Appellant introduced proof at the trial tending to show a settlement with the Cement Company, but no point is made here upon that matter. There was a jury trial and a verdict and a judgment for plaintiff for \$3,500. It is not contended that the verdict is excessive if appellant is liable. Appellant contends that the proof did not warrant a verdict that it had been guilty of negligence, causing said injury, but its main defense is that appellee was guilty of contributory negligence.

The cement works are about one mile east of the railroad depot in La Salle, and north of the main line of appellant. Appellant's railroad at that point runs nearly due east and west. It is a double track road, the south track being used by the east-bound trains and the north track by the west-bound trains. A little distance east of the cement works a switch track leaves the west-bound track and goes first in a westerly direction, curving to the northwest and north, sharply down grade. This switch track is a single track for about 371 feet, and from that point two switch tracks

proceed substantially north, and pass between the warehouse of the cement works on the west side of said tracks and its furnace room and engine room on the east side thereof. The west of these two switch tracks runs next to the warehouse and ends in a stub far enough north of the warehouse to hold six or seven cars. It is called the house track. The east track, next to the furnace room and engine room, is called the coal track, and runs north some distance past the furnace room and engine room, and then curves to the northeast, past a building called a crusher. Between the warehouse on the west side and the furnace room on the east the railroad tracks are on level ground, and as the coal track curves off to the crusher the grade rises. Appellee was struck and injured between these two tracks and a little north of the most southern of the eastern doors of the warehouse. The warehouse comes further south than the furnace room, so that there was no building directly east of where appellee was struck. The cement works are situated in a deep valley or ravine. The top of the bluff directly west of the factory premises was forty-five or fifty feet above the level of the ground at the cement works. The warehouse was 178 feet long north and south and seventy-three feet wide, and between fifty and sixty feet high. The furnace room was 142 feet long from north to south and fifty-two feet wide east and west, and between twenty-five and thirty feet high. The engine room was eighty-four feet long north and south, and fifty-three feet wide east and west. The cement was manufactured in other buildings still farther east than those above described, and was carried therefrom to the warehouse in an open conveyor above the switch tracks, which open conveyor had a roof above it. This conveyor, however, seems to have crossed over the tracks farther north than the place where appellee was injured. When the cement reached the warehouse it was placed in bags which were then loaded into box cars placed opposite the various east

doors of the warehouse on the house track. There were ten doors on the east side of the warehouse, the south door being number one and the north door number ten. The two switch tracks were seven feet apart, and each box car and coal car extends two feet or more beyond the rail, so that the space between a box car on the house track and a coal car on the coal track within which a person could safely walk was less than three feet.

The Cement Company received its coal to operate its machinery and shipped its product over appellant's road. Each afternoon a switching gang left La Salle and went east on the south track as far as the works, pushing ahead of the engine loaded cars of slack next to the engine, loaded cars of other coal next, and empty box cars farthest east. When this switch engine with cars reached the cement works it passed over to the north or west-bound track and shoved all these cars east of the switch that led into the cement works, and sent a flagman east to protect the track. The engine then left that string of cars and went down into the works, and upon the house track, and pulled out all the loaded cars thereon and any empties that might be on the house track south of the loaded cars, then went back to the main track and set the loads out west of the switch on the main track, and then returned these empty box cars to the house track and sometimes placed the empties opposite various doors of the warehouse. The engine then crossed over to the coal track, hitched on to the empty coal cars at the furnace room and went back to the crusher, and hitched on to the empties there, and then went out upon the main track and set all those empty cars upon the main track west of the switch. The engine then hitched on to the train of cars which had been brought from La Salle and started them sharply west. Then a man on the head coal car uncoupled the engine and the engine ran ahead past the switch, and a man at the switch then threw the switch and this string of

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cars brought from La Salle passed in on the switch, down the grade, and up between the warehouse and the furnace room as far as the momentum applied to it would carry it. The engine then came down on the switch track and hitched on to the other end of said string of cars, pushed the head end up as far as the crusher, left there all cars loaded with slack, and then came down opposite the furnace room and left there all cars loaded with other coal, then put over upon the house track the empty box cars, then returned to the main track and pushed back to La Salle the cars standing on the main track west of the switch. While this was the course ordinarily pursued, that order was sometimes departed from. When the switching crew first came into the yards in the afternoon their foreman communicated with the foreman of the cement works, and if for any reason he directed that the work should be done in a different order, his directions were followed. Sometimes a carload of cement was being loaded, and the work was not quite completed, and the foreman of the cement works would direct that the coal track be pulled first, and such directions were obeyed. The entire work at the cement plant usually occupied the switching crew an hour or an hour and a half. It was usually begun between two and three o'clock in afternoon, but sometimes it was done later than that. The evidence for appellee tends to show that on this day the work by which he was injured was being done between five and half past five o'clock in the evening.

WILLIAM D. FULLERTON, for appellant; BENJAMIN S. CABLE, of counsel.

COLEMAN & COLEMAN and DUNCAN, DOYLE & O'CONOR, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

On the day in question the train came from La Salle

later than usual. The loaded cars were pulled from the house track and set on the main track west of the switch; the empty coal cars were then pulled from the coal track and also set on the main line west of the switch. The engine then hitched on to the string of cars east of the switch and started the flying switch, which ran down an incline and into the yards of the Cement Company on the coal track. The proof favorable to appellee tends to show that the engine and cars had been gone from the yards forty minutes when this flying switch was made. It was between five o'clock and half past five P. M. of October 27th. The height of the bluff on the west side of these buildings, and the height of the warehouse and furnace room and conveyor above, all tended to make it much darker east of the warehouse on the house track than it was out in the open on the main line of the railroad. Appellee's proof tends to show that it was a dark or foggy afternoon and that no wind was blowing, and that when there is no wind there is much cement dust in the air about the plant, and that this increases the darkness. Appellee was at work inside of the warehouse. Shortly before the injury several men were called from the warehouse to move empty box cars to positions exactly opposite the side doors. One or two witnesses on each side testified that a car was moved from south to north opposite door number one. A very clear preponderance of the proof on each side shows, however, that the car was moved from the north to the south. Appellee had a bar and worked under the northeast wheel of the car, barring it south, while others pushed and appellee's brother went ahead to block the car when exactly opposite door number one. When the car was set or spotted, appellee from his place over the east rail of the house track looked down the other track and saw nothing. He then turned around and walked on the cinder path between the two switch tracks to the north for the purpose of barring down the next empty car. He was a German and

did not speak English. Some one gave an alarm, and a fellow workman who was situated as he was jumped out of the way. Just at this instant the string of cars came north, not attached to an engine. Loaded slack cars for the crusher were ahead. Trevillian, the foreman of the switching crew, stood in about the middle of the head car. The brakes had been set to some extent at the south end of the first and at the north end of the second loaded cars to check the speed of the string of cars down the incline to the plant. Proof offered by appellee tended to show that the speed of the cars as they went by the warehouse was ten or fifteen miles per hour. The proof favorable to appellant tended to show it was about five miles per hour. The corner of the head car struck appellee as he was thus walking north between the two tracks, and he was thrown and injured as already stated. In determining whether appellant was negligent in making this flying switch into that plant the jury were entitled to consider, among other things, the fact that it was later than the usual time for making the switch, and that it was then dusk in between the buildings, if the jury found that appellee's evidence to that effect was true. The evidence of Trevillian for defendant strongly tended to warrant the jury in finding that what was there done by appellant was negligent. He testified that as he approached these buildings he called out, because there was so much noise there (meaning from the machinery and cement works, the noise from which the proof showed was very great), that one could hardly hear when the cars were coming; that he saw that men were at work moving these box cars, and saw a man pinching or barring one of the cars, and saw that the man did not make any move. Trevillian testified that he called out because "he wanted to give them a show, because they were working at the car and probably would not know that the other cars were coming down the other track. I don't think that they knew that they were

coming." The foreman of the switching crew therefore saw that these men were in a perilous position, in a comparatively dark place, and he knew that the noise of the machinery of the cement works was so great that they might not hear the string of cars coming, and he saw that they continued at their work, and thought they did not hear the string coming. His statement that he wanted to give them a chance shows that he thought they were in danger of being struck. Except his shouting, which he knew was not likely to be heard, no alarm was given. There was another man on the next car back, but no one set any more brakes or made any effort to stop the cars. Under all these circumstances we are of opinion that we cannot say that a verdict that appellant was negligent, and that this negligence caused the injury to appellee, ought to be set aside for want of proof to support it. Appellant had proof to meet some of these conditions. It was shown, for instance, that no head-light or other light was required on the train as they went back to La-Salle. But the light on the main track in the open did not rebut the proof of darkness existing in this ravine between these buildings and east of the warehouse. All of these matters, including the speed of the string of cars at the time appellee was struck, were questions of fact to be settled by the jury, where the evidence was conflicting.

The main question is whether appellee was exercising due care for his personal safety. He had worked in the warehouse over two years, and while his work was mostly inside the warehouse, yet he was sometimes outside. His work was packing cement in sacks and loading the cars, and incidentally assisting in moving box cars to the doors when the switching crew had not performed that service and also at times moving loaded cars away from the doors. The switching crew came in and did this work every day during all the time he had been there, and he must have had a general knowledge of the manner in which they per-

formed their work. A running switch was made every day in substantially the same way as this was made. On the other hand, no duty required him to know or to closely observe in what order or manner the switching crew moved the various cars. He had nothing to do with the coal cars on the coal track, and had no duty to observe when they were set in or whether they had been set in. When the loaded cars had been set in on the coal track they were left opposite the crusher and opposite the furnace room, and the furnace room was further north than the south end of the warehouse where he was injured, so that he might not notice that the loaded coal cars had not yet been set in. He would not necessarily know whether or not they had been set in. Appellee's proof tended to show that forty minutes had passed since the switching crew had left the plant. Appellee testified that he did not know that the coal cars were yet to be set in. Some of his fellow employes in the warehouse did know that the loaded cars were yet to come in, but appellee did not talk English, and there is no proof that this knowledge had been communicated to him. The west bluff and the high warehouse and the dust in the air and the lateness in the afternoon all tended to produce a darkness at that place. He had looked south on the coal track and had seen nothing. He testified that he had never known cars to be set in so late. This is not like the case of railroad yards where engines and cars are frequently moving back and forth all day long, and where an employe of the railroad company working in such yards must necessarily know that an engine or a car is likely to pass him at any moment, and is required to be on the lookout therefor. Under all these circumstances, we are of opinion that it was a question of fact for the jury whether appellee was exercising due care for his own safety when he turned from the car left at door number one, after having looked south on the coal track and having seen nothing approaching, and walked north on the path be-

tween the two switch tracks for the purpose of barring down another car standing only a few feet further north. We regard it as a close question whether he was exercising such due care, and if the jury had found that he was not, we should not feel at liberty to interfere with that conclusion. But we also conclude that the evidence warranted a verdict either way upon that subject, and that we ought not to disturb the verdict of the jury, which means in effect that appellee was exercising due care.

It is argued that it was error to permit the witness Climek to testify to the speed of this string of cars as it came into the yards, because he had not shown special knowledge as to the speed of cars. It was held in *C., B. & Q. R. R. Co. v. Gunderson*, 174 Ill. 495, that persons familiar with trains are competent to testify to the speed thereof, and that it is not a matter for expert evidence; and the witness in question showed that he possessed sufficient experience in regard to trains to make him competent to give an opinion on that subject. The court permitted witnesses to testify that no bell or whistle was heard as this string of cars came into the plant. It is argued that this was error, as the declaration did not charge failure to ring the bell or sound the whistle. The evidence was not introduced for the purpose of charging appellant with a failure to perform a statutory duty, but for its bearing upon the question whether appellee was exercising due care. This proof showed that no whistle was sounded and no bell was rung which should have attracted his attention and caused him to ascertain that the cars were coming in. For that purpose we think the proof was properly admitted. If appellant feared that the jury would suppose that a cause of action arose from the failure to ring the bell or sound the whistle, it should have asked an instruction upon that subject, which would no doubt have been given, and any possible misappre-

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hension in the minds of the jury would have been removed.

We conclude that the cause was tried without substantial error, and that the case involves only questions of fact, and that the conclusion of the jury thereon, approved by the trial judge, should not be disturbed. The judgment is therefore affirmed.

Affirmed.

Don T. Rose, Appellant, v. Mutual Life Insurance Company, Appellee.

Gen. No. 5,023.

1. **INSURANCE**—*how days of grace for payment of premium computed.* Days of grace allowed for the payment of the second premium upon a policy are computed from the anniversary of the date upon which the policy became effective.

2. **INSURANCE**—*what laws govern construction of policy.* An insurance contract is governed by the laws of the place of the delivery of the policy, except so far as the laws of another state are by contract made a part thereof.

3. **INSURANCE**—*effect of special upon general provision of policy.* A special provision of a policy providing how payment of premium must be made, prevails over a general provision which makes a policy subject to the laws of a particular state which state has a statute providing a different method of payment.

4. **INSURANCE**—*when declaration does not state cause of action.* *Held*, that the several counts of a declaration which relied upon a policy of insurance failed to state a cause of action.

5. **PLEADING**—*effect of allegation under videlicet.* Matter other than that of essential description alleged under a *videlicet* need not be proved precisely as laid.

6. **PLEADING**—*what not positive allegation.* An allegation under a *videlicet* that a policy of insurance was issued and delivered on a particular date, is not a positive allegation.

7. **PLEADING**—*what not allegation of payment of premium.* An allegation as follows, is indefinite and argumentative: Rose "thereafter paid to said defendant all premiums due under said policy of which due notice was given him by the defendant as required by said laws of New York."

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Assumpsit. Appeal from the Circuit Court of Kane county; the Hon. LINUS C. RUTH, Judge, presiding. Heard in this court at the April term, 1908. Affirmed. Opinion filed October 14, 1908.

FREDERICK A. BROWN, for appellant; Wm. R. T. EWEN, JR., of counsel.

WINSTON, PAYNE, STRAWN & SHAW, for appellee; M. H. WHITNEY, of counsel.

MR. JUSTICE DIBELL delivered the opinion of the court.

In this suit by appellant against appellee to recover insurance upon the life of appellant's father, deceased, after two partial trials appellant withdrew the common counts and filed additional counts, and appellee refiled to the whole declaration a general and special demurrer, previously filed to the original counts, and that demurrer was sustained. Appellant elected to abide by her declaration, which then consisted of seven special counts. Appellee had judgment and plaintiff below prosecutes this appeal.

The first count set out a policy of insurance executed by appellee whereby it agreed to pay appellant \$5,000 upon the death of Herbert A. Rose. It described appellant as the wife of Herbert A. Rose, whereas she was his daughter. It also set out certain "provisions, requirements and benefits", stated on the back of the policy and made a part thereof. The policy was dated May 23, 1904, acknowledged receipt of the first annual premium of \$169.40, and provided for the payment of that sum annually thereafter on May 23, till the premiums for twenty years had been paid. Among the statements on the back of the policy set out in the first count, were the following:

"Each premium is due and payable at the Head Office of the Company in the City of New York, or, at the option of the insured, at any Agency of the Company, in exchange for the Company's receipt signed by the President or Secretary. Notice that each and

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every such payment is due is given and accepted by the delivery and acceptance of this policy, and any further notice which may be required by any statute is thereby expressly waived. * * * After this policy has been in force one year, thirty days of grace will be allowed in payment of premiums, with interest for the time taken at the rate of five per cent. per annum, during which time this policy shall remain in force for the full amount."

The count averred that appellee issued and delivered said policy to Herbert A. Rose, hereinafter called Rose, "on to wit, the 17th day of July, 1904." The count averred that the application for said policy provided that said application should be a part of the contract of insurance between Rose and appellee and that said contract should be subject to the laws of New York. It then set out a certain statute of New York adopted in 1897, and alleged that it was in force then and thereafter till the death of Rose, which statute provided that no life insurance company doing business in that state should declare a policy forfeited for non-payment of premium within one year after default in payment thereof by reason of such non-payment, unless a notice stating the amount of the premium, the place when it should be paid and the person to whom payable, should have been duly addressed and mailed to the person whose life is insured "at his or her last known postoffice address in this state", at least fifteen days and not more than forty-five days prior to the day when the same is payable; and that such notice should also state that unless such premium is paid by or before the day it falls due, the policy will become forfeited and void. The count averred that Rose paid appellee the first premium, and thereafter paid all premiums of which due notice was given him as required by the laws of New York; that Rose died at Paducah, Kentucky, on August 3, 1905; that notice of death was given appellee, with a call for blanks on which to make proofs of death, which a provision on the back of the policy

required should be on forms which appellee would furnish on request; and that appellee refused to furnish the blanks and refused to pay the policy at all, and informed the appellant that the policy was forfeited and void.

The count does not allege when Rose paid the first premium, but the policy set out therein acknowledges the receipt thereof, and if the allegation above stated that the policy was issued and delivered "on to wit, July 17, 1904," is a positive allegation that it was issued and delivered on that date, then we regard it as a sufficient allegation that the contract became effective on that date, although dated May 23, 1904. The payment was for insurance for one year, and if the policy first became effective as a binding contract on July 17, 1904, the payment carried the insurance to July 17, 1905, and the provision for thirty days of grace after the policy had been in force one year carried the period for which the insurance was valid to August 16, 1905 (*McMaster v. New York Life Ins. Co.*, 183 U. S. 25), even though Rose failed to pay the second premium, due May 23, 1905, by the terms of the policy. In the case just cited it was said that the company could not be allowed "by making the second premium payable within the period covered by the payment of the first premium, to defeat the right to the month of grace which had been proffered as the inducement to the application, and had been relied upon as secured by the payment." Rose died August 3, 1905, while the policy was therefore in force, under the allegations of the first count, if that count avers positively that it was issued and delivered on July 17, 1904.

Does the allegation under a *videlicet* of the date when the policy was issued and delivered amount to a positive averment that it was delivered on that particular day? If issue had been joined, and at the trial the proof had been that the policy was issued on July 16 or 18, or on May 23, and not on July

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17, would that have been a fatal variance from this count, or would such proof have been competent and sustained the count? In 1 Chitty's Pleading, 318, it is said: "Where a party does not mean to be concluded by a precise sum or day stated, he ought to plead it under a *videlicet*, for if he do not he will be bound to prove the exact sum or day laid; it being a settled distinction that where anything which is not material is laid under a *videlicet*, the party is not concluded by it, but he is where there is no *videlicet*." In Brown v. Berry, 47 Ill. 175, the court said: "The use of the *videlicet* is to avoid a variance, and to avoid a positive averment which must be strictly proved." In Long v. Conklin, 75 Ill. 32, where the declaration alleged, under a *videlicet*, that the contract sued upon was made on November 28, 1871, and the proof showed that it was made in January, 1872, the court said: "The day of making the contract is laid under a *videlicet*, and according to the familiar rule of pleading is not required to be proved as laid." In Chicago G. W. Ry. Co. v. People, 79 Ill. App. 529, where the dates of making certain contracts were stated in the pleadings under a *videlicet*, and it was argued that they must be proved as laid, we said: "These dates are each laid under a *videlicet*, and by well-known rules of pleading petitioner was not bound to prove the precise dates." That judgment was affirmed under the same title in 179 Ill. 441, without mentioning that question. We conclude that under this *videlicet* plaintiff could prove any other date, and that plaintiff used the *videlicet* because she intended not to bind herself to prove that the policy was issued and delivered on July 17, 1904, but wished to avail of whatever the proof might show as to the date when it became a binding contract. It must be assumed that she would have made a positive averment if she had intended to rely upon that precise date. We are therefore of opinion that this count does not contain a positive averment that the policy was issued and

delivered and a binding contract of insurance first completed on July 17, 1904. In the absence of any positive averment of a precise date when the contract became effective, we must presume, against the pleader, that the policy went into force on the day of its date, May 23, 1904.

This count therefore shows that the policy had lapsed by its own terms, unless the allegation that Rose "thereafter paid to said defendant all premiums due under said policy of which due notice was given him by the defendant as required by said laws of New York," amounts to an allegation that within thirteen months after the policy became effective he paid another premium of \$169.40, or that he received no notice and unless because of a lack of such notice the policy could not be forfeited prior to his death. We consider the allegation above quoted insufficient for several reasons. It is indefinite and argumentative. It does not positively allege that he paid a second premium. If he paid a second premium it does not allege that he paid it within thirteen months, but the allegation would be satisfied by proof that he paid it after the thirteen months had expired. It does not allege that appellee accepted the payment. Again, though this contract does not state where the contract was delivered by appellee to Rose, yet the policy set out described the person whose life was insured as "Herbert A. Rose, Paducah, in the county of McCracken, State of Kentucky," and has on its back the indorsement or stamp of "Biscoe Hindman, general agent, Louisville, Kentucky." The count avers that Rose died at Paducah, Kentucky. In the absence of a contrary averment, it is a reasonable inference against the pleader that the policy was delivered by appellee's agent to Rose in Kentucky. It was therefore a Kentucky contract and was not governed by the laws of New York, except so far as they were by the contract made a part thereof. *Equitable Life Society v. Clements*, 140 U. S. 226, 232; *Mutual Life Insurance*

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Co. v. Cohen, 179 U. S. 262; Mutual Life Ins. Co. v. Hill, 193 U. S. 551. We have already stated the substance of the New York statute of 1897, which this count averred was by the application made a part of the contract of insurance. Before the words "in this state" had been put into the statute it was held that this statutory provision of the state of New York in reference to forfeitures did not of itself apply to contracts made by a New York company outside of that state, but only to business transacted within the state of New York. Mutual Life Ins. Co. v. Cohen, *supra*; Mutual Life Ins. Co. v. Hill, *supra*. Strong reasons why such statutes cannot have extra-territorial effect are given in the Cohen case. Said former statute of New York is set out in full in Mutual Life Ins. Co. v. Phinney, 178 U. S. 327, 330. In 1897 said statute was re-enacted and the words "at his or her last-known post-office address" were changed to read "at his or her last known post-office address in this state." This made it still clearer that the act could not be operative, and that these provisions as to notice before forfeiture were not intended to be operative, outside of New York state, and cannot apply to a policy-holder whose address is in another state. Therefore no notice to Rose was required before a forfeiture would follow his non-payment of the premium for the second year. Again, according to the allegation of this count, the contract was only made subject in general terms to the laws of New York, while in the contract there was an express stipulation as above quoted that notice that each and every such payment of premium is due is given and accepted by the delivery and acceptance of the policy, and any further notice required by the statute is expressly waived. While the reference to the laws of New York is general, the provision of the contract above referred to is special and is directed particularly to the subject of notice when a payment of premium will become due. Upon the subject of ap-

parent conflict between general and special provisions of a contract the court in *Mutual Life Ins. Co. v. Hill*, *supra*, made the following observations: "The ordinary rule in respect to the construction of contracts is this: that where there are two clauses in any respect conflicting, that which is specially directed to a particular matter controls in respect thereto over one which is general in its terms, although within its general terms the particular may be included. Because when the parties express themselves in reference to a particular matter the attention is directed to that, and it must be assumed that it expresses their intent, whereas a reference to some general matter, within which the particular may be included, does not necessarily indicate that the parties had the particular matter in thought. Here, when the parties stipulate that no other notice shall be required, attention is directed to the particular matter of notice. When the stipulation is that the contract shall be construed to have been made in New York, no particular statute is referred to, and the attention may not be directed to the matter of notice, or any other special feature of New York law. The special controlled the general; that which must have been in the minds of the contracting parties controls that which may not have been, although included within the language of the latter stipulation. This is the general rule in the construction of all documents—contracts as well as statutes." For these reasons we hold that the reference in the contract to the laws of New York did not require appellee to give notice to Rose when a premium became due, as a condition precedent to the lapse of the policy for non-payment thereof, and therefore the averment that Rose paid all premiums of which due notice was given him by appellee as required by the laws of New York was not an averment that Rose paid any premium after the first. We therefore hold that the first count did not state a cause of action.

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The second count averred that "on, to wit, May 12, 1904," Rose paid appellee \$169.40, in consideration of which appellee agreed to make and deliver to Rose a contract insuring his life for \$5,000 in favor of appellee, his daughter, and agreed to give him one year of insurance, and to continue said insurance provided he would within thirty days after the expiration of the first year, and after the expiration of each subsequent year pay appellee \$169.40; that thereafter, "on, to wit, July 17, 1904," appellee delivered to Rose a policy of insurance which is set out in the count and is the same as set out in the first count. The second count averred that Rose refused to accept said policy, and gives the reasons which he stated to appellee for so refusing, and that appellee thereupon agreed to have another policy issued as of that day, properly describing the beneficiary, and otherwise identical with that set out; that Rose relying on said promises, retained the policy, but that appellee did not deliver a new policy as agreed; and it averred the death of Rose, notice of death and denial of liability, as before. If the use of the *videlicet* in alleging these dates be treated as having the effect already stated, then there is no date positively stated in this count except the date of the policy, and if that is the date when the contract became effective, then the policy had become forfeited by its own terms before Rose died, and the verbal contract, if any, is not shown to have been in force when Rose died. If the use of the *videlicet* be disregarded, the substance of the count is that Rose paid the premium for one year on May 12, 1904, and that appellee agreed to issue a policy which should be effective for thirteen months; that it delivered to Rose a policy which he refused to accept; that it agreed to issue another policy to meet his requirements and did not do so, and that Rose died August 3, 1905. The count does not allege a contract that Rose should be treated as insured from May 12, 1904, or from any other date.

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The count does not allege the payment of any further premiums. It does not allege that the policy which Rose retained but refused to accept was ever in force. It therefore does not state a cause of action at law in behalf of appellant. Whether she can maintain a bill to compel the issue of the policy promised, or whether the personal representative of Rose can maintain a suit to recover the \$169.40 cannot be determined in this suit.

The third count is substantially like the second, except that it alleges that when Rose stated to appellee the reasons why he refused to accept the policy, appellee agreed to have the date of the policy changed from May 23, 1904, "to, to wit, July 17, 1904," and to correct the description of the beneficiary from wife to daughter, the other terms to be identical with the ones set out, and that appellee did not change the policy as agreed. This count shows that the policy set out was not accepted and did not become a binding contract, but that appellee promised to prepare a different policy. As the date which the changed policy was to bear is stated under a *videlicet* the contract does not show that the date was to be within thirteen months before Rose died. If this count can be said to state a verbal contract to insure for thirteen months in consideration of the sum paid, then that contract either went into effect on May 12, 1904, or as that date is also laid under a *videlicet*, the time when it went into effect is not positively stated. If it went into effect on May 12, 1904, it had become forfeited before Rose died. If it went into effect on some other date, the count does not show that it was in force when Rose died.

The fourth count alleges that "on, to wit, the 12th day of May, 1904," Rose paid appellee \$169.40 and that for that consideration appellee agreed to pay appellant \$5,000 on the death of Rose; that appellee agreed to execute and deliver to Rose a policy to that effect to be in force from the time of its issue, and that

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said \$169.40 should keep said policy in force thirteen months from its issue; that appellee did not execute said policy but retains the \$169.40; that Rose died on August 3, 1905, and it alleges notice of death and denial of liability as before. If this alleges a verbal contract of insurance made on May 12, 1904, it also alleges that the payment was to keep the insurance in force for thirteen months and that that time had expired before Rose died. If the use of the *videlicet* in connection with the date of May 12, 1904, gave appellant the right to prove thereunder any date other than May 12, then the allegations are uncertain and do not show that the verbal contract was in force when Rose died.

The fifth count alleges that "on, to wit, the 22nd day of May, 1904," appellee made and afterwards issued the policy set out. It makes the same averments concerning the New York statute as in the first count, makes the same allegations as in the first count of the payment of the first premium, and that Rose thereafter paid all premiums of which due notice was given him under the laws of New York, and avers the death of Rose, and notice thereof and denial of liability in the first count. It does not aver when the policy was issued. It must therefore be assumed that it was issued at its date, May 23, 1904. The payment of the first premium therefore only kept the policy in force till June 22, 1905, and under the views expressed by us in discussing the first count the policy had lapsed by its own terms before Rose died, under the allegations of this count.

The sixth count is like the first, except as hereinafter stated. It sets out in full the application and medical examiner's report. The application states that it is subject to the laws of the state of New York. It contains the following answers: "I reside at 319 Jackson street, in the city of Paducah, county of McCracken, State of Kentucky." "My former residence were same." "My place of business is 104 and 105

Fraternity Building.” “My P. O. address is same.” It also contains the following at the close of the application: “I have paid \$..... to the subscribing soliciting Agent, who has furnished me with a binding receipt therefor, signed by the Secretary of the Company, making the insurance in force from this date, provided this application shall be approved, and the policy duly signed by the Secretary at the Head Office of the Company and issued. Dated at Paducah, Ky., May 12, 1904. Signature of person whose life is proposed for insurance, (Signed) Herbert A. Rose. I have known the above named applicant for about three months and saw him sign this application. I have issued binding receipt No..... on account of this policy contract. (Signed) L. A. Werner, Soliciting Agent.”

If the fact that the blanks are not filled up in the part of the application last above quoted and in the agent's certificate thereunder means that said parts of the application and certificate were not intended to be adopted by the signers, then they have no bearing on this count. If, however, they are effective parts of the application and of the certificate of the agent, then this insurance was to take effect from May 12, 1904. Under the other language of this count, which is exactly the same as that discussed under the first count, there is no averment of the payment of any premium after that covering the first year. The thirteen months had therefore expired according to this count long before Rose died.

This count also states that appellee claims to have sent to Rose at 319 Jackson street, Paducah, Kentucky, a notice of the time when the second premium became due, and it sets out the alleged notice. It then avers that 319 Jackson street, Paducah, Kentucky, was never the post-office address of Rose, but was merely his boarding house when in Paducah, and that he was never there but once or twice a month and never received said notice. As we have already held that by

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the contract notice was waived and that appellee was not bound to give notice of the maturity of the second premium, this averment was immaterial.

The seventh count is like the sixth, except that it omits all allegations in reference to an attempt by appellee to notify Rose of the maturity of the second premium. If the views we have hereinbefore expressed are correct, no count of this declaration states a cause of action.

The judgment is therefore affirmed.

Affirmed.

Joseph Perido, Appellee, v. Chicago, Burlington & Quincy Railroad Company, Appellant.

Gen. No. 5,047.

1. EVIDENCE—*should be confined to issues.* Evidence which does not tend to prove any issue involved in a case is immaterial and should be excluded.

2. INSTRUCTIONS—*effect of refusing abstract proposition of law.* An instruction though correct, if abstract in form, may be refused without the commission of error.

Trespass on the case. Appeal from the Circuit Court of Whiteside county; the Hon. FRANK D. RAMSAY, Judge, presiding. Heard in this court at the April term, 1908. Reversed and remanded. Opinion filed October 14, 1908. Rehearing denied November 11, 1908.

A. A. WOLFERSPERGER and J. A. CONNELL, for appellant.

McCALMONT & RAMSAY and D. C. WAITE, for appellee; BLODGETT & RIORDON, of counsel.

MR. JUSTICE DIBELL delivered the opinion of the court.

Johnson Creek in Whiteside county, at the place here in question, runs in a southwesterly direction

and passes through the farm of Joseph Perido, the appellee. Originally somewhat crooked, the bed of the stream has been straightened and deepened by a drainage district. The drainage district built levees of earth on each side of the new channel, and there were box culverts and iron culverts at places to allow water from the adjacent lands to pass into the creek, and these sluiceways were protected by gates to prevent water passing from the creek upon the lands. About a mile or a mile and a quarter below appellee's farm, the Fenton & Thompson Railroad Company built an embankment and laid thereon its railroad tracks across the valley drained by this creek and by Otter creek, just south of this, and built a bridge over Johnson Creek. It was supported by eight rows of four wooden piles each, and the piles were twelve to eighteen inches in diameter, and said rows were about fourteen or fifteen feet apart. The rows were at right angles to the railroad track and at an angle of 42 degrees to the stream, and there was proof that a person standing ten or fifteen rods up stream in the middle of the creek could not see through underneath the bridge, but the piles proved practically a solid obstruction to his vision. On December 30, 1906, after the ordinary water in the creek had been frozen over, there was a heavy rain and flood, and there was an ice gorge in Johnson Creek which dammed the water back so high at appellee's farm that it swept away the dike on the southeast side and flooded a large portion of his farm, and the waters left the bed of the creek and flowed across his land. Johnson Creek came from sand hills some miles above. The flood carried large quantities of sand upon portions of appellee's farm, and made the rest of it so wet and swampy that, according to appellee's proof, it was unfit for cultivation the next year. Appellee's proof was that between twenty-eight and twenty-nine acres of the farm were covered with sand to a depth of from eight and a half inches to twenty-four inches. On March 1,

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1906, preceding this overflow, the Chicago, Burlington & Quincy Railroad Company, appellant, purchased the railroad of the Fenton & Thompson Railroad Company and thereafter operated the same. Appellee brought this action against appellant to recover damages for the injury to his land occasioned by said overflow, charging that the manner in which the wooden piles were set and maintained across the stream caused the forming of this ice gorge and the consequent injury to his land. Appellee had a verdict for \$1,610.82. The court below denied a motion by appellant for a new trial, and gave appellee a judgment on the verdict, from which defendant below appeals.

It is contended that the court below erred in sustaining objections to questions put by appellant to certain experts, with reference to the formula recognized among engineers for the capacity of bridges, and whether this bridge afforded an adequate outlet for the waters of the territory drained by Johnson Creek. It was not stated as a cause of action in appellee's declaration, nor did appellee seek to prove, that the bridge was insufficient to allow the waters to pass through but the alleged cause of action was the setting of the rows of piles at an angle of 42 degrees with the course of the creek and thereby obstructing the flow of ice and debris down the stream and causing an ice gorge and a consequent flood over appellee's lands. The inquiry whether the bridge was recognized by engineers as sufficient to carry the waters of the valley was therefore immaterial.

The trial court permitted both parties to show the conditions existing on December 30, 1906, and for a few days thereafter, immediately below the bridge, but confined that inquiry to the immediate vicinity of the bridge. The dike broke and was swept away and appellee's farm was flooded about four o'clock in the afternoon of December 30. Appellant introduced evidence tending to show that there was no ice at the

railroad bridge at that time, but that the gorge of ice was then formed some distance above the bridge, and that at four o'clock that afternoon at the railroad bridge the water was flowing northeast up stream. Appellant then sought to introduce a plat of all the surrounding country, showing that Otter Creek and Johnson Creek joined about a quarter of a mile below this railroad bridge, and that the joint stream was crossed a little further down by a highway bridge and still further down by railroad bridges of the Chicago, Milwaukee & St. Paul Railroad and of another line of appellant. Appellant then inquired of witnesses what caused the water to run northeast up stream at the bridge in question. The trial court refused to admit that part of the plat which showed the union of Johnson and Otter Creeks, and the highway and railroad bridges below, and required that part of the plat to be cut out before admitting the rest of the plat in evidence, and refused to admit proof of what caused the water at the bridge to flow up stream.

Appellee was not living upon his farm at the time of this flood. He was not present till some days later. He had but one witness who testified that the gorge of ice extended up from the railroad bridge on the afternoon of December 30, when the gorge of ice caused the water to rise above the top of the dike in appellee's farm, to overflow upon his land and to wash out the dike, and to turn substantially the entire flood waters out of the creek and over his land, carrying with it the sand which was then deposited thereon and caused the main damage. That witness on cross-examination showed that he only viewed the scene from the highway bridge northeast of appellee's farm and from appellee's farm that afternoon, and that he did not go to the railroad bridge till the next day. Therefore his statement that the gorge of ice began at the railroad bridge, seems to have meant merely that he so concluded from what he saw at the railroad bridge next day. Appellee's other witnesses did not say that

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there was a gorge of ice at the railroad bridge that afternoon. Several of them did testify that on December 31, they found the ice piled up at the railroad bridge. On the other hand, appellant produced six or eight witnesses who were at the railroad bridge on the afternoon of December 30, at the hour when the dike broke on appellee's farm, or later that afternoon, several of them farmers living near by and who would not be likely to be prejudiced in favor of appellant, who testified that there was no gorge of ice or piling of ice at the railroad bridge that afternoon, and some of them testified that they could see that the ice was gorged or piled up at the bend in the creek some seventy-five rods above the railroad bridge, and that, while there was ice in the bottom of the creek at the railroad bridge, yet it had not risen, and the water was flowing over the ice. Several of them also testified that the water at the railroad bridge at that time was flowing up stream. There was a very decided preponderance of evidence that there was no ice gorge at the railroad bridge that afternoon, but that the lower part of the ice gorge, and the place where the ice began to pile and create the dam which forced the water above over the dike upon appellee's land, and washed out the dike there, was at the bend of the creek some seventy-five rods above and northeast of the railroad bridge. If that evidence was true, then the maintenance of the piles under the bridge as described did not cause the injury to appellee's land, unless the piles caused the gorge at the bend of the creek. Certainly, under the proof mentioned, nothing at the railroad bridge could have caused that gorge to form so far above the railroad bridge, unless it was the flow of the water up-stream.

We conclude, therefore, first, that the court should have awarded a new trial on the ground that the verdict for appellee was against the clear preponderance of the evidence, and, second, that the court should have permitted proof by appellant of the conditions at the

wagon bridge below this railroad bridge, and at the other railroad bridge below that, so far as such proof would tend to show what caused that water to flow up-stream. This proof is admissible, first to show that appellant was not responsible for any stoppage of ice at the bend in Johnson Creek, even if the jury concluded that such stoppage was caused or aided by the flow of water up-stream, and, second, because the jury might be disinclined to believe that the water flowed up-stream, in apparent violation of the laws of nature, and appellant had a right to remove any such defect in its proof by showing that existing conditions below, for which it was not responsible, forced the water to turn back.

Appellant argues that the court erred in giving the first instruction requested by appellee, on the ground that it made appellant an insurer. Some of the instructions in this record are not numbered, but those which may be called the first and second were held not erroneous in *O. & M. Ry. Co. v. Thillman*, 143 Ill. 127. Appellant argues that the court erred in refusing to give instruction number five requested by it. It is an abstract proposition of law and does not attempt to apply that proposition to this case, and on familiar principles it was not error to refuse it. Moreover, the general question of the exercise of engineering skill in the building of this bridge across this waterway was not involved, but only the presence of these piles in the channel diagonally across the course of the water and as close together as they were, as impeding the flow of ice when carried down by a flood. It is argued that the court erred in refusing the eighteenth instruction requested by appellant. It is said that there was no evidence that when this embankment and bridge were built there was any other natural passageway for the water, other than Johnson Creek. The evidence was there was a deep valley there about one mile wide. The drainage district and its work and dike did not go below the bridge. In a

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state of nature the water would have flowed over the surrounding country if a gorge formed in the bed of the creek, and the heavy earth embankment maintained by appellant prevented that natural flow of water. But for this embankment a gorge of ice in the bed of the creek at the place where the railroad bridge was located (if the gorge was there), would not have dammed the water back towards appellee's farm for any considerable distance. This instruction was therefore calculated to mislead the jury. Appellant complains of the refusal of its instructions Nos. 12, 15 and 16, and of the modification of its instruction No. 11. An examination of the instructions given at appellant's request will show that the substance of these instructions was given to the jury. We are of opinion that appellant was not injured by the rulings upon the instructions.

But because the court should have permitted appellant to prove what conditions below this railroad bridge caused the water to flow up-stream under the railroad bridge, and because the verdict is contrary to a clear preponderance of the evidence, the judgment is reversed and the cause remanded.

Reversed and remanded.

CASES
DETERMINED IN THE
FIRST DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS
DURING THE YEAR 1908.

**Paul Oscar Steidtmann, Appellant, v. The Joseph Lay
Company, Appellee.**

Gen. No. 13,438.

APPEALS AND ERRORS—*when merits not subject to review.* Upon reversal by the Supreme Court and remandment to the Appellate Court under a holding, among other things, that the trial court erred in excluding certain material evidence, the Appellate Court will not pass upon the merits of the cause.

Assumpsit. Appeal from the County Court of Cook county; the Hon. ALVA F. WINGERT, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1907. Reversed and judgment here. Opinion filed November 22, 1907. (Opinion not reported.) Reversed by Supreme Court and reinstated in this court October 23, 1908. Reversed and remanded. Opinion filed November 6, 1908.

A. W. MARTIN and EDWARD H. S. MARTIN, for appellant.

EMERSON E. MCGRIFF, FREDERICK S. MCCLORY and LYMAN M. PAINE, for appellee.

MR. PRESIDING JUSTICE SMITH delivered the opinion of the court.

In Steidtmann v. Joseph Lay Co., 234 Ill. 84, the judgment of this court was reversed, and the cause was remanded to this court because there was no sufficient

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finding of facts incorporated in the judgment of this court, with directions that if the facts are held by this court to be different from the finding of the trial court, this court may found its judgment upon such different findings and to recite the facts so found in the judgment; but if the facts are not so found different from the finding of the trial court, the judgment should be reversed for the errors occurring on the trial and the cause remanded to the County Court.

The Supreme Court held that reversible error was committed by the trial court in excluding certain material evidence. It would be manifestly improper for us to consider and pass upon the merits of the cause until all the material evidence can be brought before us. Accordingly, the judgment of the trial court is reversed and the cause is remanded to the County Court for the errors pointed out by the Supreme Court.

Reversed and remanded.

**Jacob Tyma, Appellee, v. Tarrant Foundry Company,
Appellant.**

Gen. No. 14,153.

1. MASTER AND SERVANT—*what essential to sustain recovery for injury caused by defective appliances.* A servant in order to recover for defects in the appliances of the business is called upon to establish three propositions: first, that the appliance was defective; second, that the master had notice thereof or knowledge or ought to have had, and third, that the servant did not know of the defect and had not equal means of knowing with the master.

2. MASTER AND SERVANT—*when former not obligated to cover gearing.* The master is not bound in law to cover the gearing, which is in plain sight, of a machine on which the servant has agreed to work, and is not liable to an action by a servant injured thereby for neglecting to do so, especially where there was no evidence tending to show that it was proper, practicable or feasible to cover the gearing on the machine in question.

3. MASTER AND SERVANT—*what within doctrine of assumed risk.* The risk of injury from working upon a derrick which is without covering to its gearing, if apparent, is assumed by the servant.

Action in case for personal injuries. Appeal from the Circuit Court of Cook county; the Hon. CHARLES M. WALKER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907. Reversed with finding of fact. Opinion filed November 6, 1908.

Statement by the Court. Appellee Tyma brought suit against Tarrant Foundry Company, appellant, to recover damages for personal injuries sustained by him January 13, 1903, while he was employed by appellant in its foundry in the city of Chicago as a moulder's helper.

The declaration consists of two counts. The first count avers that appellant was negligent in failing to use ordinary care to put and keep its crane and the windlass and gearing thereto attached in a safe condition and in good repair so that persons working on or about the same would not be injured, but it permitted one of the handles of the windlass of said derrick to become worn out, loose and in bad and unsafe condition, and commanded appellee then and there to use said handle and wind said windlass with said defective handle, in order to elevate a heavy piece of iron; and that appellee at such command, using due care for his own safety, took hold and commenced to wind and revolve said windlass, when through the carelessness of appellant as aforesaid, the defective handle became separated from and flew out of and away from said windlass with great force and throwing the right hand of appellee between certain cogs of the said derrick, and his right hand was thereby badly cut, crushed and wounded, so that four of the fingers of said right hand were then and there amputated, etc.

The second count alleges the duty of appellant to use ordinary care to cover and keep covered the gearing of said crane or derrick, so as to prevent injury to persons working upon said crane, and that it did not

regard its duty in that behalf, and did not use ordinary care to cover and keep covered said gearing, but negligently permitted said gearing to remain open and uncovered to the danger of persons working thereabout, and that by reason thereof, when the handle of the windlass of said crane became loose, the right hand of appellee was caught between the unprotected gearings of said derrick and injured.

The evidence in the record tends to show that appellee Tyma commenced to work for appellant January 2, 1903, as a common laborer, at first. Subsequently he worked as a moulder's helper in a certain room in appellant's foundry. About seven o'clock on the morning of the day he received the injury appellee began his usual work in the room where he had been working up to that time, and continued his work for about one-half hour, when appellant's foreman took appellee into another room and to one of its moulders and informed the moulder that appellee would be his helper; and then instructed appellee to do whatever the moulder told him to do.

There was an ordinary hand derrick or crane near by, used for elevating and moving for short distances castings, etc. The crane was equipped with a shaft running across two upright timbers and attached thereto. On this shaft was a small cog-wheel or pinion which intermeshed with a much larger cog-wheel attached to a drum. The weight to be raised and moved was attached to a rope which wound around the drum. The crane was operated by an iron crank or handle through the end of which was a square hole which fitted over the squared end of the shaft upon which the pinion or small cog-wheel was fastened. On one side of the crane was the slow gear and on the other side a faster gear, and this handle was used interchangeably for either gear. When the operative desired to use the slow gear he slipped the crank on the squared end of the shaft to which was fastened the slow gear; and if he desired to use the fast gear he would put the handle

on the end of the shaft connected with that gear. At the time of the accident appellee was using the slow gear. The handle or crank had been in use many years at the time of the accident in question, and the square hole in the end was somewhat worn by use.

According to the testimony of appellee, he had never used this crank or handle prior to the day of the accident. On that day he had used it twice, and while using it the third time was injured.

At the time in question the moulder had prepared, with the assistance of appellee, a large receptacle called a cope, weighing about 700 pounds, which was filled with sand. When thus filled the total weight of cope and sand was about two tons. The moulder directed appellee to raise it up by turning the drum of the crane with the handle. In obedience to the command of the moulder, appellee raised the cope to a height of four or five feet, and was then directed to lower it, which he proceeded to do by reversing the motion of the handle. While doing so the handle was jerked off, or it slipped off the end of the shaft and fell to the floor, and appellee either fell, throwing his hand into the gearing, or endeavored to stop the crane by taking hold of the gear, and his hand was drawn between the cog wheels.

The trial resulted in a verdict against appellant, upon which judgment was entered.

A motion was made at the close of the plaintiff's evidence to instruct the jury for the defendant, which was denied. A similar motion was made at the close of all the evidence and denied; and exceptions to the rulings of the court were preserved.

HORTON, BROWN & MILLER, for appellant.

W. D. MUNHALL, for appellee.

MR. PRESIDING JUSTICE SMITH delivered the opinion of the court.

A reversal of the judgment is urged upon the

grounds that the evidence is insufficient to maintain a cause of action under either count of the declaration; that the trial court erred in refusing an instruction requested by appellant; and on the ground that counsel for appellee made improper remarks in his argument to the jury. In the view we take of the case it will be unnecessary for us to consider any other than the first ground above stated.

The rule of law in respect to the burden of proof that is imposed upon a servant in a suit against his master for injuries resulting from defective machinery is stated in section 414 of Wood on the Law of Master and Servant, as follows: "The servant, in order to recover for defects in the appliances of the business, is called upon to establish three propositions: 1st. That the appliance was defective; 2nd. That the master had notice thereof, or knowledge, or ought to have had; 3rd. That the servant did not know of the defect, and had not equal means of knowing with the master". This is the well settled law of this State. *Goldie v. Werner*, 151 Ill. 551; *Armour v. Brazeau*, 191 *id.* 117, 126; *Sargent v. Baublis*, 215 *id.* 428, 432, 433; *Montgomery Coal Co. v. Barringer*, 218 *id.* 327, 329.

The evidence shows that the crank which appellee was using was the simplest possible appliance, and that it was designed to slip on and off the shaft readily and easily as it was desired to use it on one end or the other of the shaft. No method or means was provided for fastening the crank on the shaft. The crank is not shown to be in a bad or unsafe condition, although it was worn, and it fitted loosely on the shaft. Everything about it was open and obvious at a glance, and appellee, by the exercise of ordinary care in the use of it, must have had full knowledge of all defects in it, and was therefore bound to take notice of any such defects. As said in *Armour v. Brazeau*, *supra*, he could not assume a fact against his own knowledge, and assume that a defect open to his observation did

not exist. The evidence does not tend to prove that the handle was so worn out that it did not engage the shaft when properly placed thereon. On the contrary, it shows that the handle did engage and control the shaft when properly placed thereon, and that the cause of the injury, on appellee's theory of the case, was the removal of the handle in some way from the shaft, whereby appellee lost control of the derrick after the load had been lifted to the desired height, and while appellee was endeavoring to lower it. The witness Motzny testified that when he saw appellee's hand in the gearing the handle was on the ground, and the witness picked it up and put it on the shaft. This he did doubtless in order to use it in releasing appellee's hand.

The witness Storz testified: "I examined the handle right after Tyma was hurt. I found it worn out, it fell out. The handle was loose there in the hole. The hole in the handle was worn out. The hole there was too big, and that is all. I couldn't tell how much it was too loose. * * * I used the same crank handle there during the week that I worked there after this accident. We hoisted whatever loads happend to come along, quite a few were copes, lifted the same kind of cope that was being lifted at the time this man was hurt".

Appellee Tyma's account of the accident is as follows: "I raised the cope with both hands, then the moulder said 'down' and I commenced to let it down. The handle was loose and it kind of jerked and the handle flew off, and I got my hand in there. The handle went onto the floor".

This is all the evidence in the record to support the allegations in the first count of the declaration that the defective handle caused the injury to appellee. It does not warrant the inference, we think, that appellee was injured through or by reason of any defect in the handle.

Appellant called as witnesses Johnson, Abplanalp,

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Black, McIntyre, Stumpf and Ingstead. All of these witnesses testified that the handle was not out of repair at the time appellee was injured, and that the same handle was used every day on the same shaft for six months after the accident to appellee, without any change or repairs on either handle or shaft. Some of the witnesses testified that the handle in question had been used constantly from the day of the accident to appellee, January 13, 1903, until the day of the trial of the case, May 14, 1907, without any change or repairs. We think, therefore, that the testimony on behalf of appellee fails to make out the cause of action averred in the first count of the declaration and, further, the great preponderance of the evidence in the case shows that the appliance furnished appellee was not defective, and that appellee's injury was not caused by the worn condition of the handle.

As to the negligence averred in the second count of the declaration that appellant neglected and failed to use ordinary care to cover and keep covered the gearing of the derrick and that in consequence of such negligence appellee's hand was thrown into and between the gearing and injured, the evidence fails to show that there was anything about the cog-wheels which made them dangerous, uncovered as they were, to an operative in the ordinary course of his employment in the operation of the derrick. It was not necessary for appellee in operating the derrick to put any part of his body in close proximity to the wheels. The uncontroverted fact shown by testimony offered by appellant is that appellee did not properly place the handle on the shaft or he pulled it off the shaft in some manner and it fell to the ground, and thereupon appellee took hold of one of the gear wheels and tried to keep it from turning and so keep the cope from going down to the ground; that he held on so long that his hand was forced around between the small pinion and the large wheel. After this testimony was given by Johnson and Abplanalp and Stumpf, appel-

lee was recalled on rebuttal and made no denial of the statement of these witnesses. No evidence was offered in behalf of appellee controverting the testimony of these witnesses. Their evidence therefore stands uncontradicted or explained; and if true, as we think it must be considered, the negligence averred in the declaration was not the cause of the injury. On the contrary it appears that the injury to appellee's hand was the result of his own inconsiderate and impulsive act.

Furthermore, as the court said in *Kolb v. Chicago Stamping Co.*, 33 Ill. App. 488, speaking through Mr. Justice Moran, at page 490 of the opinion: "There is no evidence tending to show that the appliances for doing the work were not of the usual kind, or that they lacked any safeguard that was in use on such machines, or that its operation was attended with any danger not plainly apparent and not easily avoided by ordinary attention. Counsel for appellant strenuously argues that it was negligence not to have the treadle boxed, but there is no evidence introduced to show that it could be boxed, or that it was usual or customary to box treadles on such machines".

So here, there is no evidence in this record that it is proper, practicable or feasible to cover the gearings on the derrick in question; or that on similar machines such gearings were covered or that it was usual and customary to cover them.

A master is not bound in law to cover the gearing, which is in plain sight, of a machine on which the servant has agreed to work, and is not liable to an action by a servant injured thereby for neglecting to do so. *McGuerty v. Hale*, 161 Mass. 51; *Wilson v. Mass. Cotton Mills*, 169 *id.* 67.

Appellee was a man forty years of age and of ordinary intelligence and powers of observation. He assumed to work on the derrick in its then condition without the gearing covered and without making any complaint as to its condition. The danger of getting

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caught in the gearing was an obvious one, and was as apparent to appellee as it would have been had he been particularly cautioned against it. Appellee, therefore, assumed the risk of operating the derrick without a guard or cover.

Appellant's motion at the close of all the evidence to instruct the jury to find the defendant not guilty should have been allowed and the jury should have been so instructed.

The judgment of the Circuit Court is reversed, but the cause is not remanded, and a finding of fact is made.

Reversed with finding of fact.

Bedelia Fitzgerald, Appellee, v. City of Chicago, Appellant.

Gen. No. 14,159.

1. **PLEADING**—*when averment of injuries sufficient to admit particular evidence.* Held, that a declaration which after averring certain specific injuries, proceeded as follows: "and she thereby then and there suffered divers internal and external injuries, and she thereby also then and there received a serious and permanent shock to her spine and nervous system, and as a direct result and in consequence of said injuries she became and was sick, sore, lame and disordered," etc., is sufficient to admit evidence of injuries to knees, ribs and nerves.

2. **EVIDENCE**—*what improper form of hypothetical question.* It is improper, after an expert has testified to finding certain physical injuries, to ask him if in his opinion a particular accident caused such conditions.

3. **EVIDENCE**—*what not erroneous exclusion in action for sidewalk injury.* It is not error to refuse to permit a witness to testify as to whether there was a beaten path leading onto or off the sidewalk in question at either end of it, nor is it error to refuse to permit a witness to testify as to whether a particular street or sidewalk in question was the usual way of travel from a particular point.

4. **APPEALS AND ERRORS**—*what essential to preserve propriety of*

question for review. In order to preserve for review the propriety of a hypothetical question put to a medical expert, it is essential that an exception be preserved to the ruling of the trial court.

5. **MEASURE OF DAMAGES**—*in action for personal injuries.* The use of the phrase "doctor's bill" in an instruction upon this subject is criticised in a dissenting opinion filed in this case by Mr. Justice Chytraus.

CHYTRAUS, J., dissenting.

Action in case for personal injuries. Appeal from the Superior Court of Cook county; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907. Affirmed on *remittitur*. Opinion filed November 6, 1908.

Statement by the Court. This action was brought by Bedelia Fitzgerald, appellee, against the City of Chicago to recover damages for injuries alleged to have been sustained November 12, 1904, by falling upon a defective sidewalk on the north side of Sixty-eighth street, near and east of Stony Island avenue, Chicago. The plaintiff had judgment, and the defendant prosecutes this appeal.

The declaration avers in substance that appellant possessed and controlled a certain public sidewalk at the place above described, and that it negligently permitted a certain portion of said sidewalk to become and remain in a defective and improper and dilapidated condition of repair, in that many of the boards composing said sidewalk were loose and unfastened, and the stringers upon which said boards rested were decayed and rotten and some of the boards were missing, and all of the boards were unfit for the purpose for which they were used; that said condition of the sidewalk had existed for such a length of time prior to the injuries complained of that the appellant knew, or by the use of ordinary care in that behalf, would have discovered said defective condition. And it is averred that appellee, while walking along and upon said sidewalk with all due care and without knowing its loose condition, stepped upon one of said loose

boards, and was thrown violently upon the sidewalk, suffering certain alleged injuries.

All of the witnesses introduced on the trial practically agree that the piece of sidewalk in question had become out of repair and was dangerous to walk upon, and had been in this condition for several months prior to the accident in question.

The evidence in the record shows that there was a heavy wind blowing, and that appellee went upon the sidewalk in question in order to obtain the protection of an adjacent high board fence. While walking along on the sidewalk close to the fence she stepped with her right foot upon the end of a board on the right side of the stringer, and as she did so the plank, being loose, tipped up, and her right foot went into the hole thus made, and while in the act of bringing her left foot forward it struck the board and she was thrown and fell heavily upon her side and face.

The trial resulted in a judgment against appellant for \$2,500, which appellant contends is excessive and erroneous.

EDWARD J. BRUNDAGE and JOHN R. CAVERLY, for appellant; EDWARD C. FITCH, of counsel.

JOHN F. WATERS, for appellee; JOEL BAKER, of counsel.

MR. PRESIDING JUSTICE SMITH delivered the opinion of the court.

Appellant contends that the court erred in not excluding the testimony of Dr. Cox introduced by appellee, on the grounds of a variance and incompetency.

The record shows that shortly before testifying, Dr. Cox made an examination of appellee for the purpose of qualifying himself to testify in the case as an expert. He was asked to describe to the court and jury what he found from his examination, confining himself to the objective symptoms. He testified that

on the sixth and seventh ribs, just back of the posterior axillary line, he found two lumps; that he examined her ankles and knees and shoulders and he found on the right knee a creaking noise on motion, and it was not as limber as the other knee; and that he found the same condition on the left shoulder. Counsel for appellant thereupon moved to strike out the above testimony, on the ground that there was no allegation in the declaration that the knee or ribs were injured. The court denied the motion.

We are of opinion that the averments of the declaration are broad enough to make the testimony admissible and that the court did not err in refusing to strike out the testimony.

The same witness further testified that he examined appellee's nerves—the nerves of the eyes, of the skin, of the knees and wrists and elbows; that the nerves of the skin were not active, and did not respond to irritation readily; that the nerves of the eyes were slow in action and the knee jerked and the wrist jerked and the reflex actions were exaggerated, and that the circulation was poor. He examined the eyes in reference to the action of the pupils, which he found slow and sluggish in their reaction, and that this indicated a sick nerve. This testimony was objected to by appellant on the same ground, and the court overruled the objection. In this ruling we think the court did not err. The declaration after averring certain specific injuries proceeds: "and she thereby then and there suffered divers internal and external injuries, and she thereby also then and there received a serious and permanent shock to her spine and nervous system, and as a direct result and in consequence of said injuries she became and was sick, sore, lame and disordered," etc. These averments, we think, were sufficient to justify the admission of the evidence objected to, and that there was no variance.

The witness stated that the conditions which he found might be produced by an injury, and if they re-

sulted from an injury suffered November 12, 1904, and if she had been treated by a physician since that date, the conditions which he found were permanent.

It is urged that this testimony was improperly admitted because the questions put to the witness did not ask for his opinion as to whether the accident of November 12, 1904, caused the conditions described.

We do not think it would have been proper to ask the witness whether in his opinion the accident of November 12, 1904, caused the conditions. That was a question of fact for the jury. In *Chicago Union Traction Co. v. May*, 221 Ill. 530, the court say at page 536 of the opinion: "We think it was a correct practice for the court to permit appellee to prove the condition of her health at and prior to the time she was injured, and then to follow up that proof by showing her physical condition from the time of her injury down to the time of the trial, and submit the question of the cause of her then physical condition, as a question of fact to the jury under proper instructions", etc.

We think there is evidence in the record to support the hypothetical questions put to Dr. Cox. We find no objection made, or exception saved on that ground, to the hypothetical questions put to Dr. Cox, and hence there is no such question on his testimony for this court to review.

We find no reversible error in refusing to permit Koehler, Jr., to testify as to whether there was any beaten path leading onto or off the sidewalk in question at either end of it, or in refusing to permit the witness Fox to testify whether or not Sixty-eighth street or the sidewalk in question was the usual way of travel out to Stony Island avenue from the pipe yard and waterworks. This evidence would in no wise aid the jury to decide whether appellee was in the exercise of due care under the circumstances immediately before and at the time of the accident.

The court gave what is known as the eighth instruction requested by appellee upon the measure of damages. This instruction, after enumerating several

elements of damages which the jury should take into consideration, proceeds as follows: "all monies necessarily expended or become liable for doctor's bills, if any, while being treated for such injuries which the jury may believe from the evidence she has expended or become liable for, if any", etc.

It is contended that there is no evidence upon which to base the instruction.

Dr. Small testified that he made eight or ten visits to appellee, and she was in his office four or five times, and it may have been more than that; and that he charged her two dollars a visit; that he rendered her a bill for these services and she paid him for his services. We think this evidence afforded a sufficient basis for that part of the instruction.

It is further urged that there is no evidence of any "loss of time and inability to work and transact business", which the instruction directed the jury to consider.

Appellee testified that since the accident she has been unable to do any baking, cooking, washing or scrubbing. Dr. Small testified that appellee was confined to her room with pleurisy for several weeks. The evidence tends to show that some of the injuries complained of are permanent. We think the evidence was sufficient in this particular for the jury to consider, and afforded a sufficient basis for the instruction.

The record discloses no substantial defense to the action. But, upon a consideration of the injuries shown and their extent, we are of the opinion that the verdict and judgment of \$2,500 is excessive. In our opinion the evidence justifies a recovery for \$1,500, but not more than that amount. If, therefore, appellee shall remit from said judgment one thousand dollars and file such *remittitur* in writing in this court within ten days, the judgment may be affirmed, but otherwise it will be reversed and the cause remanded.

Affirmed on remittitur, otherwise reversed.

Remittitur filed and judgment affirmed.

Mr. Justice CHYTRAUS dissenting: The rule of law presented by the plaintiff's eighth instruction, which rule the jury were directed to adopt and follow in admeasuring to the plaintiff her damages, I cannot assent to as being correct. The proposition is that in determining the amount of plaintiff's damages the jury (always so far as shown by the evidence) should take into consideration the nature and extent of plaintiff's physical injuries, and they may take into consideration "suffering in body and in mind, if any, resulting from such physical injuries, and such *future* suffering and loss of health, if any, as * * * she *has sustained* or *will sustain* by reason of such physical injuries" and "all monies necessarily expended or become liable for doctor's bills, if any, while being treated for such injuries which the jury may believe from the evidence *she has* expended or become liable for, *or will* necessarily expend and become liable for".

Aside from the ambiguity and great uncertainty of meaning, arising from the very *careless* use of language—certainly deplorable in a judicial proceeding—the instruction appears to me to be open to the objection that it lays down the rule that a "doctor's bills", and not the usual, reasonable and customary charge of value of services rendered by the doctor, is the test or measure of damage.

Marianna Godzicka, Appellee, v. Thomas Krollk, Appellant.

Gen. No. 14,168.

1. VERDICT—*when not disturbed as against the evidence.* A verdict is final on a question of fact unless it is palpably against the clear weight and preponderance of the evidence.

2. INSTRUCTIONS—*need not contain repetitions.* A correct instruction may properly be refused if its substance is contained in another given.

Action in case for personal injuries. Appeal from the Superior Court of Cook county; the Hon. SAMUEL C. SROUGH, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907. Affirmed. Opinion filed November 6, 1908.

HORTON, BROWN & MILLER, for appellant.

R. WILSON MORE, for appellee.

MR. PRESIDING JUSTICE SMITH delivered the opinion of the court.

Appellee, Marianna Godzicka, brought action in the Superior Court against appellant, Krolik, to recover damages for personal injuries sustained by her in falling upon a walk on the premises of appellant, caused, as it is claimed, by the defective condition of the walk. Appellee had judgment for \$500 which appellant seeks to reverse on two grounds: first, that the verdict is against the weight of the evidence; and second, the court erred in refusing to give certain instructions requested by appellant.

It appears that appellant was in July, 1905, the owner of premises known as No. 607 Holt avenue, Chicago, which were improved and were rented to divers tenants. Appellee had lived in a rear house on the premises prior to the time of the alleged injury about ten months. The only means of ingress and egress which she had to and from the premises occupied by her was over the walk in question. While walking over the walk, a board broke under appellee's foot and her foot and leg went into the hole to a point just below the knee and she fell upon the walk, injuring her leg and hip, and her head struck against the brick wall of the building.

Upon a review of the evidence in the record bearing on the question of the condition of the sidewalk, we find that seven witnesses, including appellee, testified to its dangerous condition. Appellee testified that a board broke under her and her foot and leg

went through; that the boards were loose and some were rotten.

The witness Zwiziak, who lived in the front part of the premises six months and moved from there on May 3, 1905, says that most of the boards from the center of the building to the front were decayed and loose, the heads of the nails being sunk almost through the boards; that he nailed down one of the boards himself some time in April, and that he notified the agent of the condition of the walk.

Antoine Maciejewski, who lived in the front part of the premises about six months and used the walk, testified that the walk was rotten and shaky, and that she saw the hole where appellee fell; that the board was broken and was old and rotten, and the hole was large because the board was wide.

John Godzicka, husband of appellee, testified to substantially the facts just stated above.

Joseph Luzak, who lived in the premises, testified that the boards of the walk were loose and rotten, and that he helped to make repairs on the walk shortly before the accident.

Mary Brzicki testified that she lived in the rear house of the premises nearly two years with her husband and family; that there were loose and decayed boards in the walk, and the stringers were decayed, and that the walk had been in that condition a long time, and that she notified appellant's agent of the condition of the walk.

Martin Godzicka saw the hole the night of the day of the accident. The board was from four to six inches wide and "it broke right down through". "It was an old board and rotten on the bottom".

This was in substance the testimony on behalf of appellee. Appellant called four witnesses as to the condition of the sidewalk. Koristan says he passed over the walk in July, 1905, and did not see any broken or rotten boards.

Pallasch, appellant's agent, says he passed over the

walk probably thirty times in June, 1905, and there were no rotten boards. Wroblaski, employed by Pallasch as a carpenter and repairer, was at the premises a few days after a cement sidewalk was laid in front of the premises in July, 1905, and did not see any broken or loose boards, or any holes; he did not pay any attention to it. Gwizela, also employed by appellant's agent as carpenter and repairer, was working on the property six days in July, 1905, and passed over the walk three or four times a day. He says there were no broken or rotten or loose boards; they were all made fast between July 4th and July 20th; that every repair necessary was made. Bessie Schmelcer says the walk was in perfect condition. Valerian Pallasch, daughter of appellant's agent, testified that she went over the walk two or three times a month and there were no broken boards and it did not shake as one walked over it.

It is manifest from this testimony that there is a sharp conflict between the witnesses for appellee and those called by appellant. The verdict of the jury must be final on such a question unless it is palpably against the clear weight and preponderance of the evidence. We find no ground in this record for holding that the verdict is against the weight of the evidence.

In so holding we have not overlooked the contention of appellant that the testimony in support of appellee's case is conflicting; nor have we failed to give due weight to the testimony of the physicians, particularly as to finding no injury upon examinations made by them. But the question of the injury received by appellee, if any, was for the jury to determine, and we cannot say that its verdict is palpably wrong on the evidence.

Errors are assigned upon the refusal of the court to give instructions numbered respectively 15, 22 and 27.

The first instruction given at the request of appellant covered the entire case presented by the plead-

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ings and the evidence. It embraced substantially every rule of law expressed in the refused instructions. The substance of refused instruction No. 15 is contained in given instruction No. 1. Refused instruction No. 22 is covered by given instruction No. 1 and by given instruction No. 9. Refused instruction No. 27 is fully covered by given instructions Nos. 1 and 13. We find, therefore, no error in the refusal of the court to give the instructions named.

Finding no error in the record, the judgment is affirmed.

Affirmed.

Vincent C. Mooney, Administrator, Appellee, v. City of Chicago, Appellant.

Gen. No. 14,180.

1. NEGLIGENCE—*what essential to recovery in action for sidewalk injury.* In order for the next of kin to recover for the death of their ancestor by reason of an alleged defective sidewalk it must appear by a preponderance of the evidence (1) that the municipality was guilty of the negligence alleged in the declaration; (2) that the deceased was injured by reason or as a result of such negligence; (3) that the deceased was in the exercise of due care at the time of the accident, and (4) that his death was the proximate result of the injury sustained.

2. INSTRUCTIONS—*when need not embody all elements essential to recovery even though concluding with direction.* Where an instruction purports to define the law of one branch of the case, it is not necessary to embody other elements essential to recovery even though it directs a verdict, where other instructions are given which perform that office.

3. INSTRUCTIONS—*when use of word "injured" not misleading.* In an action for death caused by negligence the use of the word "injured" without words indicating that the death of the deceased was caused thereby, *held*, not misleading.

4. RELEASE—*when does not bar right to recover for death caused by alleged wrongful act.* A release made by the plaintiff's intestate in his lifetime discharging one tort-feasor from liability for injuries

sustained does not bar a right of action as against another joint tort-feasor which accrues to the next of kin by virtue of death ensuing from such injury.

Action in case for death caused by alleged wrongful act. Appeal from the Superior Court of Cook county; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907. Affirmed. Opinion filed November 6, 1908.

Statement by the Court. Appellee, Vincent C. Mooney, as administrator of the estate of Edward Dillon, deceased, brought this action against appellant, City of Chicago, to recover damages for causing the death of said deceased.

The negligence averred in the declaration, consisting of two counts, is that appellant permitted Harrison street, one of its public streets, at the intersection of Clark street therewith, "to remain in a dangerous and unsafe condition, and permitted and allowed several of the paving stones of said street to be removed and to remain absent and missing from said street, and allowed a large and deep hole and depression to exist in said street at said place". Both counts aver that the hole was dangerous and existed long enough before the accident to charge the city with notice thereof, and that Dillon at the time of the accident described was in the exercise of due care for his own safety. The first count alleges that while Dillon was driving a certain wagon and team along Harrison street at the said intersection a wheel of his wagon ran into said hole by means whereof the wagon was broken and Dillon was thrown with great force and violence to the pavement and thereby received injuries which resulted in his death.

The second count differs from the first only in that it avers that the wagon was loaded with barrels, and that Dillon was thrown to the ground and one or more barrels fell upon and struck him and thereby he sustained injuries which resulted in his death.

Both counts allege the survival of a widow and

children of Dillon, his next of kin and make profer of letters of administration. The general issue was pleaded to the declaration.

The testimony produced on the trial by appellee tends to show that at the time of the accident, March 5, 1903, at the northeast corner of the intersection of Clark and Harrison streets, there was an opening in the pavement of the roadway at the curb, through which water was drained from the gutter of the street to the sewer, and about a foot from the sewer inlet there was a hole or depression in the granite pavement produced by the removal of four or five granite blocks. The hole was six inches deep and the blocks around it were loose. When the right rear wheel of the wagon on which the deceased was riding went into the hole it slid into the opening into the sewer. The axle of the wagon broke when the wheel went into the hole in the pavement. The right rear corner of the wagon went down and the deceased was thrown violently upon the sidewalk from the driver's seat where he was sitting. The wagon was a barrel wagon having a box and barrel rack on it, and was about forty feet long.

When the accident happened Dillon was turning the corner out of Harrison street into Clark street. Several barrels fell off the wagon, and one or more fell upon Dillon. The hole had been in the pavement and the blocks around it had been loose for months. The evidence offered for appellee further tended to show that the injuries to Dillon were serious and caused his death.

The testimony offered by appellant tended to show that there was no hole in the pavement at the time of the accident, and that the accident did not cause the death of Dillon. It further tended to prove that the skein of the wagon was worn through at the point where the axle broke, and that it was the defective skein which caused the break, and for that reason Dillon was guilty of negligence which contributed to

the accident; that Dillon in his lifetime had executed to his employer, McKay, a release for his injuries, and consequently appellant was also released from the cause of action involved in this suit.

The jury returned a verdict against appellant for \$3,500 and judgment was entered thereon for that amount.

EDWARD J. BRUNDAGE and JOHN R. CAVERLY, for appellant; EDWARD C. FITCH, of counsel.

FRANK V. CAMPE, for appellee; A. L. GETTYS, of counsel.

MR. PRESIDING JUSTICE SMITH delivered the opinion of the court.

The question is presented, on the errors assigned and relied on for a reversal of the judgment, whether or not the verdict is contrary to the weight of the evidence.

It was necessary, undoubtedly, for appellee, to prove by a preponderance of the evidence (1) that appellant was guilty of the negligence alleged in the declaration; (2) that the deceased was injured by reason of, or as the result of that negligence; (3) that the deceased was in the exercise of due care at the time of the accident; (4) that his death was the proximate result of the injuries sustained. The question is, does the evidence in the record sustain the averments of the declaration?

The evidence as to the existence of the hole in the pavement is somewhat conflicting. Sullivan testified that he was following the deceased at the time of the accident, and that there was such a hole at the time of the accident, and that it was made by the absence of granite blocks from the pavement, and that the granite blocks around the hole were loose. The witness John T. Dillon says that he was a carriage driver and drove over Harrison street two or three times

every night and he noticed the condition of the pavement at the northeast corner of Harrison and Clark streets; that there was a large hole near the curb, the blocks being out of the street. Hartman testified that he worked for years in a clothing store at the northeast corner of Harrison and Clark streets and saw the accident in question; that there was a hole there in the pavement made by some cobble-stones being removed from the pavement; that he saw several wagons drop into that hole and lose their loads in the same manner that Dillon's wagon did. One was a furniture wagon, the rear wheel of which broke, about two months before the accident in question, and the furniture was thrown upon the sidewalk. The witness Stucke, a shoemaker, was working at the southwest corner of Harrison and Clark streets, saw Dillon's wagon drop into the sewer hole. The stones were loose around the hole and had been loose for months. He saw other wagons fall in there long before Dillon's wagon fell in. He saw many accidents at that corner where the barrel wagon fell, and that a furniture wagon tipped over there about a month before Dillon's wagon and the furniture fell off. The witness Coyne testified that there was a hole and that the paving stones were loose around it, and that he had seen wagons turn over at that place.

On behalf of appellant McKay testified that he examined the place soon after the accident on the same day and there was no hole there. The other witnesses on behalf of appellant on this point were policemen who had traveled their beat for years past this corner, and that although it was their duty to observe and report defects in the streets, they never saw the hole.

In our opinion the verdict of the jury on the question of the negligence of appellant is sustained by the evidence and we cannot say it is against the weight of the evidence and ought to be set aside.

The evidence shows that the skein of the axle around which the right rear wheel revolved was worn through

and the axle was thereby weakened where it broke when the wheel went into the hole in the pavement. And the witness McKay was permitted to testify to his conclusion that the breaking of the axle was due to the defective skein. At the time of the accident it was daylight.

Appellant, on this evidence, bases a contention that the deceased was guilty of contributory negligence in that he ought to have seen the hole and avoided it, and as an experienced teamster he well knew the jolts and jars to which his wagon would be subjected in passing over defects in the pavement, and yet he loaded heavily his wagon with a skein worn out, and drove his wagon along the streets without avoiding the hole in the pavement.

We are not inclined to hold that the verdict was against the weight of the evidence on this question. There are good grounds for placing little reliance on the testimony of McKay in this case; and as to whether Dillon ought to have seen the hole and avoided it under the circumstances was a question for the jury to determine in the first instance, and we find no reason in the record for arriving at a different conclusion from that of the jury.

What was the proximate cause of Dillon's death was a controverted question on the trial of the case. There is evidence in the record given by Bridget Dillon, his widow, by John T. Dillon, his brother, by Coyne, who knew him seven or eight years, and by Biddle, who knew him about fifteen years, that before the accident he was a stout, healthy man and weighed about two hundred pounds; that he never had any medical attendance, and never complained about his back or kidneys. The testimony is that at the time of the accident Dillon sustained a compound fracture of the right leg. The verdict of the coroner's jury found that he died from degeneration of his vital parts, complicated by a compound fracture of the right leg. There is medical testimony to the effect

that at the time of his death he was suffering from the compound fracture, a dislocation of the right ankle, and shock; that the fracture did not heal at all and infection or blood poisoning had set in, and his death resulted therefrom. Dr. Lewke, coroner's physician, testified that he examined deceased after death and he found the ununited fracture of the right leg, a fatty heart and liver, and enlarged spleen and enlarged and fatty kidneys. He testified that septic infection might produce this condition; that poisons coming from the wound might travel through the blood, pass through the liver and heart and cause a destruction of the tissues and the tissues are then replaced by fat cells, that is the usual process in the body; that this will take place rapidly, as soon as two weeks. From the time of the fracture of the leg, to the death of the deceased, was two weeks and three days. And further, Dr. Lewke testified that Dillon died of fatty degeneration of the heart and kidneys, complicated with the compound fracture of his right leg; that both conditions were factors producing his death. The witness could not give the direct cause which produced Dillon's death because he did not know what his history and condition were before the injury, but when he was given Dillon's previous history and condition according to the evidence and assuming these to be true, he stated that the death was caused by septicemia due to a compound fracture of the leg.

Dr. Hamill's testimony tends to show that septicemia caused the death.

Upon a consideration of all the testimony and the circumstances of the case bearing upon this question we are of opinion that the evidence shows that the death of Dillon was the proximate result of the injuries sustained in the accident in question.

Our conclusions upon the proofs made in the case on the different points necessary to be covered by the evidence in order to entitle appellee to recover, log-

ically and necessarily dispose of the contention of appellant that the verdict is contrary to the weight of the evidence, adversely to that contention.

At the request of appellee the court gave to the jury what is known in this case as instruction No. 6. It is in the following terms:

“The court instructs the jury that it is not necessary to a recovery in a case of this character that the evidence should show actual notice to the City of Chicago of the defective condition of the street, if you believe from the evidence that it was defective. If the jury believes from the evidence that the street in question where the plaintiff is alleged to have been injured was out of repair at the time, and had been out of repair for a considerable length of time before said injury is alleged to have occurred for so long a time that the city authorities, by the use of ordinary care on their part, would have known of the defective condition of said street in time before the accident in question, by the exercise of ordinary care to have repaired the same, then notice of such condition of said street may be presumed, and if the jury believe from the evidence in this case that the street where the alleged injury is said to have occurred was out of repair, and was in an unsafe condition to travel upon at the time of alleged injury, and had been so out of repair and in an unsafe condition for a considerable length of time before said injury is alleged to have occurred, so that the city authorities, by the use of ordinary care on their part, might have known of the condition of said street in time to have repaired the same before said injury and did not repair the same, and that the intestate, while driving over said street on the 5th day of May, 1903, one of the wheels of the wagon which he was on fell into a hole in said street and he was thereby injured, and if you further believe from the evidence that the intestate was, at and immediately before the time of said injury, in the exercise of reasonable care for his own safety, then you will find the defendant guilty.”

Appellant criticises this instruction and claims that it is erroneous because it directs the jury to find the

defendant guilty, if, after finding the facts which are supposed to constitute the negligence of appellant, they find Dillon was injured, and says nothing in regard to such injury causing Dillon's death. The contention is that for the mere injury appellee could not recover in this action, and therefore, the instruction submits the case to the jury on a false issue. *Montgomery Coal Co. v. Barringer*, 218 Ill. 327; *Illinois I. & M. Co. v. Weber*, 196 *id.* 526; and *I. C. R. R. Co. v. Smith*, 208 *id.* 608; and *City of Chicago v. Sutton*, No. 13369 in this court (not reported) are cited to the effect that if an instruction directs a verdict for either party or amounts to such direction in case the jury find certain facts, it must necessarily contain all the facts which will authorize the verdict directed; and as it directs a verdict it must be considered by itself—it is not supplemented by the other instructions given.

A careful examination of the instruction before us shows that it is directed to the question of notice to the city, and what constitutes such notice, of the condition of the street. Upon that subject there is no claim that the law is not correctly stated. In order to apply the law to the evidence in the case it was proper to state in the instruction certain elements in the case shown by the evidence upon which it became necessary for the jury to consider the question of notice. This we think is the purport and scope of the instruction. In *Pardridge v. Cutler*, 168 Ill. 504, the instruction under consideration by the court undertook to review the whole of the evidence and omitted the defendant's evidence which went to the merits of the case. But where an instruction, as in this case, purports to define the law of one branch of the case we do not think it is necessary to embody every element essential to a recovery, even though it directs a verdict, where other instructions are given which perform that office.

In *Judy v. Sterrett*, 153 Ill. 94, an instruction was given on the subject of a contract to marry which fixed no definite time for its performance. The mani-

fest purpose of the instruction was to inform the jury that the law would presume the contract was to be performed within a reasonable time, and that under such a contract to marry within a reasonable time or on request the request need not be made by the plaintiff herself, but might be made through an authorized agent. The instruction closed with a direction that if the jury found that anyone authorized by the plaintiff for that purpose had called upon the defendant and requested him to marry the plaintiff, and he refused or neglected to do so, then they should find the issues for the plaintiff. The court in commenting upon the instruction said at page 100: "It is not necessary that an instruction intended to serve some particular office, or to define the law of some particular branch of the case, should have embodied in it every fact or element essential to sustain the action (citing authorities). It is sufficient if the jury were informed in other instructions what was required to constitute a valid subsisting contract of marriage." It is true the ground of objection there urged was that if submitted to the jury the question of law as to whether or not there was "a valid subsisting contract of marriage", but the principle of the rule stated applies to the instruction under consideration here.

Furthermore, this action is for the recovery of damages for the benefit of the next of kin for their financial or pecuniary loss by the death of Dillon. The jury must be presumed to have known when the instruction was given to them what the action was for, and that it was not for the injury which occasioned his death. They knew this both from the declaration and other instructions given them. Hence they could not have been misled by the use of the word "injured" without words indicating that the death of the deceased was caused thereby. We do not think the error pointed out was harmful.

It is urged that this instruction and instruction No. 5 given by the court are defective and erroneous in

that they direct a verdict, but wholly ignore a material element in the case—the release or satisfaction given by Dillon, the deceased, to McKay, his employer, covering all claims on account of the injury sustained.

In connection with the testimony of James McKay, Dillon's employer at the time of his injury, appellant offered in evidence a release or satisfaction signed by deceased, dated May 13, 1903, to James McKay, purporting to release all claims on account of the injuries he had received. A release of appellant as a joint wrongdoer, of the cause of action sued on in this case, is claimed through this instrument.

This contention involves a misapprehension of the claims covered by the release, or of the cause of action on which this suit is based. That release or satisfaction settled and discharged all claims which Dillon had against McKay, and, we will assume, against appellant for the injury sustained by him through the negligence of McKay, or appellant by which he was injured. But, Dillon did not in his lifetime have the claim or cause of action here involved which arose for the first time at his death in favor of his widow and next of kin, and did not have the right or the power to release and discharge it. It is a cause of action unknown to the common law, and was first created in this State by the act of the general assembly, approved February 12, 1853. A full exposition of this statute, its objects and purposes, and the nature and measure of damages which may be recovered under it, are given in *City of Chicago v. Major*, 18 Ill. 349; *Chicago & Rock I. R. R. Co. v. Morris*, 26 *id.* 400, and *Maney v. C. B. & Q. R. R. Co.*, 49 Ill. App. 105. It follows, therefore, that the claim or cause of action released or satisfied by the McKay document was an entirely different claim or cause of action from the statutory cause of action involved in this case, and the release had no relation to this case, and was erroneously admitted in evidence and was properly ignored in the instructions.

We find no reversible error in the rulings of the court in admitting the testimony of Dr. Hamill as to the cause of Dillon's death. We do not think it was error to overrule the objection to the hypothetical question put to Dr. Lewke calling for his opinion as to the cause of death.

The judgment is not excessive, we think, under the evidence. The other contentions of appellant made in argument are answered by what we have already said. We find no fatal error in the record, and the judgment is affirmed.

Affirmed.

Isaac Zechman et al., Defendants in Error, v. Jacob Zasofsky, Plaintiff in Error.

Gen. No. 14,885.

APPEALS AND ERRORS—when signing of bill of exceptions without jurisdiction. After the lapse of sixty days from the date of judgment and after the expiration of the time fixed by order for presenting the bill of exceptions, the Municipal Court is without jurisdiction either to extend the time for presenting such bill of exceptions, or to sign and seal the same.

Error to the Municipal Court of Chicago; the Hon. JOHN H. HUME, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1908. Motion allowed. Opinion filed November 10, 1908.

GROSSBERG & KOMPTEL, for plaintiff in error.

MOSES, ROSENTHAL & KENNEDY, for defendant in error.

MR. PRESIDING JUSTICE SMITH delivered the opinion of the court.

The defendant in error moved the court to affirm the judgment entered in the case by the Municipal Court for failure on the part of the plaintiff in error to file

his abstracts of record and briefs in the time required by the rules of court.

The ground assigned does not justify the affirmance of the judgment and that motion must be denied.

A second motion is made to strike the bill of exceptions in said case from the record filed in this court.

It appears from the record that the judgment of the court below was entered April 2, 1908, and the plaintiff in error—defendant below—was given forty days in which to file his bill of exceptions.

On May 2, 1908, an order was entered extending plaintiff in error's time to file his bill of exceptions ten days.

On May 13, 1908, an order was entered giving plaintiff in error to June 10, 1908, to file his bill of exceptions.

On June 6, 1908, an order was entered giving plaintiff in error to June 15, in which to file his bill of exceptions.

On June 15, 1908, an order was entered giving plaintiff in error to June 22, 1908, in which to file his bill of exceptions.

On June 24, 1908, an order was entered giving plaintiff in error to and including July 10, 1908, in which to file his bill of exceptions.

On July 28, 1908, an order was entered giving plaintiff in error to and including August 15 in which to file his bill of exceptions.

On July 28, 1908, the bill of exceptions was filed.

From these orders it appears that the time for filing the bill of exceptions by virtue of the order entered on June 15, 1908, expired on June 22, 1908. The bill of exceptions was not filed on that date, but on June 24, 1908, an order was entered extending the time for filing bill of exceptions to and including July 10, 1908. There appears a hiatus of two days between the expiration of the time fixed in the order of June 15 and the entry of the order of June 24, 1908. There also appears a hiatus between the expiration of the time

under the order of June 24, 1908, extending the time to July 10, 1908, in which to file the bill of exceptions and the entry of the order of July 28, 1908, and the filing of the bill of exceptions on that date. Upon the filing of the bill of exceptions the defendants in error duly objected to the signing and sealing of the bill of exceptions by the trial court, on the ground that the court had lost jurisdiction to settle the bill of exceptions.

By section 21 of the Municipal Court Act it is provided that there are no terms in the Municipal Court, but that every judgment, order or decree of said court is final after the expiration of thirty days from the rendition thereof, and the court loses power at the expiration of such time to vacate, set aside or modify such order. By section 22 of the Municipal Court Act it is provided that the practice in cases of appeal and writs of error to the Municipal Court shall, in first-class cases, be the same—as near as may be—as the practice in cases of appeals from and writs of error to circuit courts in similar cases. And section 38 of the Municipal Court Act provides, among other things, that a bill of exceptions may be tendered to the judge in a first-class case at any time within sixty days after the entry of the final order of judgment, or within such further time thereafter as the court, upon application made thereafter within such sixty days, may allow.

In our opinion the order entered on June 24, 1908, being more than sixty days after the entry of the final judgment in the case and being entered two days after the expiration of the order of June 15, 1908, was without authority or jurisdiction of the Municipal Court, and was therefore void under the rule laid down in *Hill v. The City of Chicago*, 218 Ill. 178, in which the rule of practice announced in *Plotke v. Chicago Title & Trust Co.*, 175 Ill. 234, is affirmed.

The motion therefore to strike the bill of exceptions from the record in this case must be allowed.

Motion allowed.

Pittsburgh & Ind. C. Co. v. Harder's Fire. S. & V. Co., 144 App. 486.

**Pittsburgh & Indiana Coal Company, Appellant, v.
Harder's Fireproof Storage & Van Company, Ap-
pellee.**

Gen. No. 15,090.

1. **APPEALS AND ERRORS**—*when bill of exceptions not part of record.* A bill of exceptions though signed and sealed is not part of the record unless filed with the clerk.

2. **APPEALS AND ERRORS**—*within what time transcript from Municipal Court must be filed.* The transcript upon an appeal from a judgment of the Municipal Court must be filed in the Appellate Court within forty days after the date of the judgment unless an order has been entered by the Municipal Court within such forty days granting further time for the filing of such record.

Appeal from the Municipal Court of Chicago; the Hon. EDWIN K. WALKER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1908. Record stricken and appeal dismissed. Opinion filed November 6, 1908.

WINKLER, BAKER & HOLDER, for appellant.

DUNN & HAYES, for appellee.

MR. PRESIDING JUSTICE SMITH delivered the opinion of the court.

Motions are made by the appellee that the bill of exceptions purporting to be a part of the record be stricken from the files; second, that the record of the Municipal Court filed in this cause be stricken from the files; and third, that the judgment of the Municipal Court be affirmed.

It appears from the record that on June 6, 1908, final judgment was entered in the Municipal Court against appellant, Pittsburgh & Indiana Coal Company, in favor of appellee, Harder's Fireproof Storage & Van Company. On June 30, 1908, an appeal bond was approved by the trial court. July 14, 1908, the trial court entered an order extending the time for filing a bill of exceptions "thirty days from date of

statutory period, to wit, July 16, 1908". On August 12, 1908, the court ordered that time to file bill of exceptions be extended twenty days from August 16, 1908. September 4, 1908, a bill of exceptions was presented to and signed by the trial judge; and on September 18, 1908, it was filed with the clerk of the Municipal Court. The record was filed in this court October 7, 1908.

In *Hall v. Royal Neighbors*, 231 Ill. 185, it is held that a bill of exceptions, though signed and sealed by the judge, does not become a part of the record unless it is filed. Under this ruling the bill of exceptions did not become a part of the record of the Municipal Court within the time fixed by the court by the order of August 12, 1908, for it was not filed with the clerk until September 18, 1908. It is possible (though the question is not before us, and we express no opinion thereon), that this defect in the record might be cured by a *nunc pro tunc* order directing the bill of exceptions to be filed as of September 4, 1908, but even though such an order should be procured and the bill of exceptions were to be filed as of that date, there is an insuperable objection to the jurisdiction of this court to hear and determine this appeal, because of the fact that the record of the Municipal Court was not filed in this court within forty days after the date of the judgment as provided by section 22 of the Municipal Court Act, and no order was entered within the forty days granting further time for filing the record. *Arthur v. Doyle*, 141 Ill. App. 432.

The motion to affirm the judgment of the Municipal Court is denied. The motion to strike the record from the files is allowed and the appeal is dismissed.

Record stricken and appeal dismissed.

Van Cleef v. City of Chicago, 144 App. 488.

Anna Van Cleef, Appellee, v. City of Chicago, Appellant.**Gen. No. 13,671.**

1. **STREETS**—*when municipality liable for injury occurring upon.* A person injured while attending a street fair by being pushed from the steps leading from a platform, which steps led from the entrance to a tent to the open street, is entitled to recover from the municipality which has authorized the holding of such fair in such manner, notwithstanding the person so injured was not using the street in question for purposes of travel.

2. **NUISANCE**—*when authorization of use of street illegal.* A municipality is without power to authorize the holding of a street fair upon a public street and to do so is to authorize the creation of a public nuisance, rendering it liable to persons injured thereby while in the exercise of ordinary care, the liability of the municipality in such case attaching even where the parties holding such fair have been guilty of negligent construction from which the injury results.

SMITH, P. J., dissenting.

Action in case for personal injuries. Appeal from the Superior Court of Cook county; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1907. Affirmed. Opinion filed November 6, 1908. Rehearing denied November 20, 1908.

JOHN R. CAVERLY, for appellant; SIGMUND ZEISLER, of counsel.

DARROW, MASTERS & WILSON, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

This is an appeal by the defendant, the City of Chicago, from a judgment for \$15,000 recovered in an action on the case for personal injuries.

The amended declaration contains three counts. The first count avers that the city, being on July 24, 1903, a municipal corporation and in the control of its streets, did, in violation of its duty, "to so manage

and control its said streets as not to injure the plaintiff", knowingly authorize and permit a certain building to be erected at and in the intersection of Ninety-second street and Exchange avenue; that "said building was erected in an unsafe and dangerous manner, particularly in that a certain stairway in and about said building was unguarded by guard-rails, so that by reason thereof plaintiff, while coming out of said building, together with a large number of other persons, and in the exercise of all due care and caution for her own safety, was pushed and crowded off of and from said stairway, and by reason thereof, fell to and upon the ground", as a result of which fall she suffered a fracture of the right leg and other injuries and permanent disability.

The second count repeats the allegations of the first as to the stairway mentioned in that count; avers that the city council of the defendant city duly passed, June 15, 1903, an order whereby permission was given to use certain enumerated streets, including those where the building in question was erected, for a "merchants' carnival and open street fair, to be held from July 20 to July 25, 1903, with all necessary authority and permission to regulate and conduct a street carnival and necessary shows, stands and attractions in the business center of South Chicago;" that by virtue and in pursuance of this permission "a certain building was erected upon and in said streets of said city as aforesaid, which said building was for the purpose of giving entertainments and performances"; that said building was "in direct violation of" section 1882 of the city ordinances, which provides that "no person shall erect or place any building, in whole or in part, upon any street, alley, sidewalk or other public ground within this city, under a penalty of not more than fifty dollars"; and that on the day of the accident the plaintiff was in said building and "was in the act of coming out of and from said building after a certain entertainment or performance", when she

was crowded off said stairway, which was "unprotected or guarded by any guard-rail or protection".

The third count is substantially the same as the first count, except that it avers that the city knowingly permitted said building to be erected and to remain "for a considerable space of time" in said street intersection prior to the accident; that by reason thereof "said building became and was a nuisance, and concerning which the city knew or should have known, and which said building was in an unsafe and unstable condition in this, to wit, that the said stairs leading to and from said building were unprotected and without a guard-rail and concerning which the city knew or should have known".

June 15, 1903, the city council of the City of Chicago passed the following order:

"Ordered that permission be and is hereby given to use the following streets in the City of Chicago for the Merchants Carnival and open street fair to be held from July 20th to July 26th, 1903, with all necessary authority and permission to regulate and conduct a street carnival and necessary shows, stands and attractions in the business center of South Chicago. Said street fair being given by the business men of the Eighth Ward; 90th street, from South Chicago avenue to the strand; 91st street, from South Chicago to the foot of Green Bay avenue; 92nd street, from South Chicago to Harbor avenue; 93rd street, from South Chicago avenue to Harbor avenue; Muskegon avenue, from South Chicago avenue to 90th street; Waukenbaugh avenue, from 91st to 90th street; Exchange, from Lake Shore and Michigan Southern Railroad to 90th street; Huston, from 93rd to 90th, Erie, from South Chicago to 90th street, Ontario, from South Chicago avenue to 90th; Superior, from Harbor to 90th; Buffalo, from 92nd to 90th; Mackinaw, from Harbor to 90th street; Green Bay, from Harbor to 90th street; Strand, from Harbor to 90th street; South Chicago, from 90th to Erie."

Ninety-second street crosses Exchange avenue "be-

tween Ninetieth street and the Lake Shore and Michigan Southern Railroad", and the intersection of said street and avenue was therefore a portion of the streets mentioned in said order. In said streets, at their intersection during the time limited by said order three shows were conducted; an animal show, Lilliputians, and Enoch the Waterman, each in a tent set up for that purpose. The tent in which the show of "Enoch" was conducted was large enough to hold three hundred people. In front of it was a platform six feet wide, fifteen or twenty feet long, and four or five feet above the street. From this platform a stairway, five or six feet wide, led down to the level of the street. There was no guard-rail or other protection at either end of this stairway. To go into the show people passed up said stairway and across said platform, and in coming out they recrossed the platform and went down said stairway to the open street. The show of "Enoch" lasted about fifteen minutes. It was repeated from time to time, and at the close of each exhibition those in attendance left the tent. A charge was made for admission to the show, but the city received no part of such admission fees. Plaintiff went with her husband to said show. When the show was over they, with the other people in attendance, two or three hundred in number, started to go out. Plaintiff crossed the platform and began to go down the stairs. As she was stepping from the first step from the top of the stairway to the next lower step, she was pushed or crowded by the people alongside of and behind her, from the end of the step, and fell to the ground. In her fall her right thigh bone was broken a few inches below the hip, and her right arm a few inches below the shoulder. Before she had fully recovered, while in the act of sitting down in a chair her thigh was again broken at the point of the first fracture. Before she had fully recovered she slipped from a wheel chair to the floor, and again her thigh bone was broken at the same point.

Up to the time of her first injury, plaintiff's health had been good and she had done the housework for her family. Since that time she has not been able to walk, even with the aid of crutches.

Appellant does not question that plaintiff's present condition of almost total disability is permanent, but insists that at the time of her first injury she was suffering from a disease of the bone, called osteomalacia.

From the evidence, the jury might properly find that said stairway was not reasonably safe for the purpose for which it was used, but was unsafe and dangerous, and also that the plaintiff was not guilty of contributory negligence.

The legislature has given to city councils in this state power, "to open streets; to regulate the use of the same; to prevent or remove obstructions or encroachments upon the same, and to license, suppress and prohibit * * * theatrical and other exhibitions, shows and amusements." It has not given to city councils any authority to grant permission to hold a street fair or conduct a show in a street. Permission to conduct a "show" in a street carries with it permission to erect in such street a tent or other structure in which to conduct such show. The council of defendant therefore, in passing the order in question, attempted to authorize the setting up of the tent in question in a public street for the purpose of conducting a show therein.

The general duty of the city in respect to its streets is to use reasonable care to keep its streets reasonably safe and convenient for travel. It owes that duty only to those who use the street as a street or highway. Plaintiff when she was injured was not using the street as a street or highway. She had left that part of the street which remained open and unobstructed, gone into the tent to see the show and on her way out, in going down the stairs which led from the entrance to the tent to the open street, was pushed or crowded from

the stairway and thereby injured. We think that the defendant cannot be held liable to the plaintiff for the injuries so sustained by her, on the ground of a breach of its duty to use care to keep its streets reasonably safe for travel, for the reason that the plaintiff was not, when injured, using the street as a street or for the purpose of travel.

The question remains, however, whether the defendant is not liable to the plaintiff on another ground. The criminal code declares that it is a public nuisance "to obstruct or encroach upon public streets". The council of defendant in the attempted exercise of the power given by the legislature, "to regulate the use of streets and to license shows", exceeded its authority and passed an order which in terms gave permission to obstruct and encroach upon certain of its streets for a purpose not authorized by law, to place an unlawful structure, a public nuisance, in said streets.

In *Schultz v. Milwaukee*, 49 Wis. 254, 260, it was said by Mr. Justice Lyon: "If a municipal corporation, in the attempted exercise of any power conferred upon it by law, as to license shows, amusements and the like, exceeds its authority and licenses the placing of a public nuisance in the street, or the unlawful and dangerous use of a street for any purpose, and an injury results therefrom, without negligence on the part of the person injured, the municipality is liable to respond in damages for such injury."

In *Johnson v. New York*, 186 N. Y. 139, the board of aldermen, by special ordinance, granted a certain club permission to conduct speed trials for automobiles in a certain boulevard on a certain day. The ordinance provided that at such trials a greater speed than eight miles per hour might be allowed. The statute then in force made it a misdemeanor to drive an automobile at a greater speed than eight miles an hour in any city, except where a greater speed was permitted by ordinance. Plaintiff went to see the

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speed contest and was in a field adjoining said boulevard when an automobile was deflected from the road, ran into the field where plaintiff was and struck and injured her. In the opinion it was said at page 145: "That this ordinance, which did not assume to authorize the operation of automobiles generally at a greater rate of speed than that prescribed in the statute, and permitted only certain specified persons to use the highway as a race course on a particular occasion, was not only invalid as a regulation of the speed of automobiles, but also operated as a participation by the defendant in an unlawful act, is settled by the recent decision of this court in *Landau v. City of New York*, 180 N. Y. 48."

In *Cohen v. Mayor, etc., of New York*, 113 N. Y. 533, the City of New York granted to M. permission to store his wagon in the street in front of his store. He negligently tied up the thills. Another wagon struck said wagon, turned it around, the string which held up the thills broke and the thills fell, striking plaintiff's intestate, who was passing by on the sidewalk, and inflicted on him injuries from which he died. It was held that the license was issued without authority, that the storing of the wagon in the street was a public nuisance; that the defendant by licensing it made itself liable for any damages resulting therefrom, the same as if it had itself maintained the nuisance.

In the opinion in that case it was said, p. 537: "But assuming that the city had no right to issue the permit, it is urged that such license did not authorize the negligence which caused Cohen's death, and that the act of the defendant was too remote to be regarded as the proximate cause of the damage herein. We do not think so. The act of the defendant was wrongful, it consisted in setting up an obstruction in the public highway, and the accident happened because of the presence of the obstruction at the point in question. It was there by the act of the defendant, and being

there it has caused the injury. To be sure it may be said that if the thills had not been negligently tied, they would not have fallen. But that was simply the way in which, by reason of the presence of the obstruction, the accident occurred. There is always reasonable ground for apprehending accidents from obstructions in a public highway, and any person who wrongfully places them or aids in so doing, must be held responsible for such accidents as occur by reason of their presence. The obstruction in such case must be regarded, within the meaning of the law on the subject, as the proximate cause of the damage."

In *Wheeler v. Fort Dodge*, 131 Iowa, 566, the council of the defendant granted a certain club "the privilege of the streets for a Fourth of July celebration * * * , the privilege of selling privileges for booths and entertainment," etc. The club arranged with a certain person to give an exhibition called a "Slide for Life". A wire was strung across the street down which the performer was expected to slide in some sort of harness. The harness gave way and the performer fell, striking and injuring the plaintiff, and it was held that the city was a participant in the maintenance of a public nuisance, and that the breaking of the harness was a concurrent and not an independent cause of plaintiff's injury.

In this case there is no controversy as to the evidentiary facts. From the evidence the jury might properly find that the stairway was not reasonably safe for the purpose for which it was provided and used. In the attempted exercise of the power to regulate the use of streets and to license shows, the council of defendant by affirmative act authorized the erection and continuance of a public nuisance in its streets. The defendant thereby became a participant in creating and maintaining such nuisance. The negligent construction of the stairway was a concurrent and not an independent cause of plaintiff's injury.

In the opinion of the majority of the court the de-

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fendant is liable to the plaintiff for her injuries, although sustained when she was not using the street as a street.

Whether the subsequent fractures of plaintiff's thigh at the point where it was fractured in her fall from the stairway resulted from and were the direct consequence of such fall was, we think, on the evidence in this record a question for the jury. If such subsequent fractures and her disabled and crippled condition resulted from and were the consequence of the first fracture and injury, the damages awarded cannot be held excessive.

The judgment of the Superior Court will be affirmed.

Affirmed.

Mr. Justice CHYTRAUS concurring in the conclusion, but not in all of the reasoning of the opinion.

Mr. Presiding Justice SMITH dissenting.

Charles E. Everett, Appellant, v. David D. DeLong, Appellee.

Gen. No. 14,094.

1. SLANDER—*what not essential to defense of privilege.* The defense of privilege to an action of slander may be introduced under the general issue.

2. SLANDER—*what essential to establish defense of privilege.* The burden is upon the defendant to show that the occasion of his speaking the alleged slanderous words was privileged and that such words were spoken from a sense of duty and with an honest belief in their truth. An occasion of privilege is where such defendant has an interest in the subject-matter of the communication and the person to whom the communication is made has a corresponding interest.

3. SLANDER—*when privilege arises.* A clergyman who employs words alleged to be slanderous in the belief of their truth and from a sense of duty in order to aid the members of his church in deter-

mining whether the resignation of one of its trustees shall be accepted is entitled to interpose the defense of privilege.

4. SLANDER—*what words not actionable per se*. It is not actionable *per se* for a clergyman to say of a trustee of his church, "That man is a dangerous man to have around little girls; I understand he has little girls from the Sabbath school stay in his office. I fear for the little ones."

BAKER, J., dissenting.

Action in the case for slander. Appeal from the Superior Court of Cook county; the Hon. ALBERT C. BARNES, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907. Affirmed. Opinion filed October 6, 1908. Rehearing denied October 27, 1908.

JAMES C. HOOD and J. B. HUTCHINSON, for appellant.

CHARLES A. WARREN and JAMES K. LAMBERT, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

In an action on the case for slander, brought by appellant against appellee, the trial resulted in a verdict of not guilty. A motion for a new trial was denied and judgment entered on the verdict, to reverse which the plaintiff prosecutes this appeal.

The defendant, at the time he is alleged to have spoken the slanderous words, was the pastor of the Fellowship Congregational Church, a church in that part of Chicago known as the South Side, and had been such pastor for several years. In January and February, 1905, the question of erecting a new church edifice was under consideration. The trustees favored building the new church on the lot on which the old church stood. The pastor and some of the members favored buying another lot for the new church. To obtain aid from the Congregational Church Building Society, a certificate of the pastor was required, that in his opinion the building of the new church at the

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place proposed was for the best interest of the church. This certificate the defendant refused to give, and the trustees tendered their resignations. Plaintiff was not a member of the church, but was a trustee, chairman of the finance committee of the board, a teacher in the Sunday School, superintendent of the Junior Society of Christian Endeavor, a member of the Senior Society of Christian Endeavor of the church, and a member of the Evangelistic Committee which was appointed to arrange for holding revival services in the South Side Congregational Churches.

The right to elect trustees and to accept the resignation of trustees was in the members of the church. The right to accept the resignation of the superintendent of the Junior Endeavor Society was in the official board of the Senior Endeavor Society.

Plaintiff tendered his resignation as a trustee early in February, and it was accepted at a meeting of the members of the church held February 22, 1905. He tendered his resignation as superintendent of the Junior Endeavor Society February 23, and it was accepted by the official board of the Senior Society March 27, 1905.

Four witnesses testified that defendant spoke certain words of and concerning the plaintiff, Dr. Proctor, Mrs. Holmberg, Linn and Elder. As to certain of said words the contention of appellee is, that they were not spoken by him; as to other of said words, his contention is that they were spoken on occasions that were privileged, that such privilege was not absolute but qualified, and that there could be no recovery for the speaking of such words without proof of express malice, and that other of said words are not actionable.

The contention of appellant that the defense that the occasion was privileged cannot be made under the plea of not guilty but must be specially pleaded, is against the great weight of authority, both in this country and in England. In 6 Robinson's Prac. 885,

the general rule, "that under the general issue it may be shown that the words were spoken or published on an occasion which justified the speech or publication", is stated, and it is said: "Since if not before *Delaney v. Jones*, 4 Esp. 191, the principle has been well understood; * * * *Best*, C. J. (*Sims v. Kinder*, 1 C. & P., 271, 11 Eng. C. L.) 'was clearly of opinion, that any fact which goes to show that the defendant spoke *bona fide* and without malice, is admissible in evidence; and that it is admissible, on the general issue; * * * *Parke B.*, in *Wright v. Woodgate*, 2 C. M. & R., 156, says, 'the proper meaning of a privileged communication is only this: that the occasion, on which the communication was made, rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that the defendant was actuated by motives of personal spite or ill will, independent of the occasion on which the communication was made'; * * * *Wilde*, C. J., in *Hoare v. Silverlock*, 9 Man. G. & S., 26, 67 Eng. C. L., says: 'The inference of malice arising from the publication of libelous matter is rebutted by showing that it was published on a lawful occasion. Not guilty puts in issue the tendency of the alleged libel and also the lawfulness of the occasion on which it was published. It does not follow that a defense may not be given under not guilty, because it might form the subject of a special plea'."

As to the words, the speaking of which the defendant denied, the question whether the occasion was privileged does not arise. In order to entitle his words, *prima facie*, to the protection that attaches to communications made in good faith in the fulfilment of a duty, the burden was on the defendant to show that the occasion was privileged, that the words were spoken from a sense of duty and with an honest belief in their truth. The defendant as to certain words, the speaking of which he admitted, gave evidence tending to prove such facts, but offered no such evidence

as to the words which he denied that he had spoken.

One of the occasions where a communication is privileged is, "where defendant has an interest in the subject-matter of the communication and the person to whom the communication is made has a corresponding interest. In such a case, every communication honestly made in order to protect such common interest is privileged by reason of the occasion". *Odgers Slander & Libel*, 234. In *Bradley v. Heath*, 12 Pick., 163, Chief Justice Shaw said, pp. 164, 5: "Where words imputing misconduct to another are spoken by one having a duty to perform, and the words are spoken in good faith, and in the belief that it comes within the discharge of that duty, or where they are spoken in good faith, to those who have an interest in the communication, and a right to know and act upon the facts stated, no presumption of malice arises from the speaking of the words; and therefore no action can be maintained in such cases, without proof of express malice. If the occasion is used merely as a means of enabling the party uttering the slander to indulge his malice, and not in good faith to perform a duty or make a communication useful and beneficial to others, the occasion will furnish no excuse."

Whether the occasion was privileged is a question of law. When the words testified to by Dr. Proctor and Mrs. Holmberg were spoken, plaintiff's resignation as a trustee had been tendered, but not accepted; the witnesses were members of the church and defendant was its pastor. The fact that plaintiff was not a member of the church is not material. The question to be decided by the members of the church was, whether the resignation of the plaintiff of his office of trustee of the church should be accepted. In that question the witnesses as members of the church and the defendant as its pastor had an interest. To aid the members of his church in coming to a right conclusion on that subject the defendant owed to them a duty. We think the court did not err in holding

the occasion of the speaking of said words to each of said witnesses privileged.

The witness Linn was a member of the board whose duty it was to act on plaintiff's resignation of his office of superintendent of the Junior Christian Endeavor Society of the church, a society the members of which were young people, some of them members of the church, others only of the congregation. The words were spoken the day that said board was to act on such resignation and before the board had met. Defendant testified that he called on Linn to ask that plaintiff's resignation be accepted, and in the conversation that ensued the words in question were spoken. We think that for the same reasons that the occasion of the conversations with Dr. Proctor and Mrs. Holmberg were privileged the occasion of the conversation with Linn was privileged.

We are unable to perceive any ground on which the occasion of the conversation with Elder can be held privileged. It occurred after plaintiff's resignation as trustee and superintendent of the Endeavor Society had been accepted. If he was then a member of the Senior Endeavor Society and of the Evangelistic Committee, no action was pending or contemplated in respect to the plaintiff or his relation to said society or committee before any board or organization to which Elder belonged. The only question then as to the actionable words testified to by Elder was whether they were spoken by the defendant. The words testified to by Elder: "That man (the plaintiff) is a dangerous man to have around little girls; I understand he has little girls from the Sabbath school stay in his office. I fear for the little ones", do not in their common acceptation amount to a charge that plaintiff "had been guilty of fornication or adultery", and are not actionable under the statute of this state.

We find no error in the rulings of the court on questions of evidence. It was competent for the plaintiff

to give any evidence tending to prove express malice, or colorable pretence on the part of the defendant in the speaking of words spoken on occasions which were privileged. It was competent for the defendant to give any evidence which tended to prove that the defendant in speaking such words acted from a sense of duty and with an honest belief in the truth of the words so spoken. It was therefore competent for the defendant to give evidence tending to prove that certain statements in relation to plaintiff were made to him, and that he believed such statements to be true.

In the opinion of the majority of the court there is no reversible error in the rulings of the trial court on instructions. In this opinion the writer is unable to concur. Among the instructions given for the defendant are the following:

“25. The court instructs the jury that if they believe from the evidence, and under the instructions of the court, that the defendant uttered and published the words, or one or more sets of the words, or substantially the same words, at the times and in the presence of the persons as charged in the declaration, and if the jury also believe from the evidence that the defendant was at said times a clergyman and pastor of a church, and that the plaintiff was at said times connected with said church or its work in some capacity or that it was proposed to have him so connected, and that said words were uttered and published by the defendant only with relation to plaintiff's connection or proposed connection with the same to persons who were then members of said church or who were in some way connected with or related to said church or its congregation, Sunday School or one or more of its auxiliary societies, and that if the jury also find that the defendant so uttered and published the words in question in his capacity of such pastor, believing them to be true, and without malice, and with a good purpose and with belief that he was performing his duty as said pastor, and intending that such action on his part should be for the interest and good of said church, that then said words would be of the kind

known as qualified privileged communications, and not actionable and as having been stated under privileged circumstances, and the jury should find the defendant not guilty."

"26. The court instructs the jury as a question of law, that malice is the gist of an action of the character of this case, and that, if they believe from the evidence and under the instructions of the court that the defendant uttered and published the words, or any one or more set or sets of the words, at the times as charged in the declaration, but without malice and only in the capacity of a clergyman and to persons and in relation to matters in some manner connected with the church of which he was at such times pastor, or its Sunday School or auxiliary societies, and if the jury also find that the defendant believed said words to be true and thereby intended to promote the welfare of said church, that then there can be no recovery by the plaintiff, and the jury should find the defendant not guilty."

The defendant testified that he did not speak certain slanderous words of the plaintiff which Dr. Proctor, Mrs. Holmberg and Linn testified that he spoke. As to those words the only question was, whether the words were spoken, for the defendant gave no evidence tending to show that such words were spoken under the circumstances stated in either of said instructions. Said instructions should, in the opinion of the writer, have been limited and restricted to words spoken under the circumstances therein stated.

Appellant further contends that the verdict is so manifestly against the evidence that for that reason the judgment should be reversed. We will consider first the slanderous words the speaking of which was denied by the defendant. As to those words, as has been said, the only question for the jury was, whether they were spoken. Each set of such words was, according to the testimony for the plaintiff, spoken in the hearing of only the plaintiff and one witness, and their testimony was conflicting. We cannot say that

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the finding of the jury, implied by the verdict, that such words were not spoken is against the evidence.

As to the slanderous words, spoken on occasions which were privileged, which the defendant admitted that he spoke and gave evidence tending to show that they were spoken in the fulfilment of a duty, in good faith, and with an honest belief in their truth, the question for the jury was, whether they were so spoken, or were spoken with and from express malice, and on that question, under the evidence, the verdict of the jury must be held conclusive.

In the opinion of the majority of the court the record is free from reversible error, and the judgment will be affirmed.

Affirmed.

Mr. Justice BAKER dissenting.

Adelbert Sebastian, Appellee, v. Chicago Coated Board Company, Appellant.

Gen. No. 14,154.

1. MEASURE OF DAMAGES—*approved form in action for personal injuries.* An instruction upon this subject, as follows, approved:

"The court instructs the jury that if you find for the plaintiff, you will be required to determine the amount of his damages; in determining the amount of damage the plaintiff is entitled to recover in this case, if any, the jury have a right and they should take into consideration all the evidence pertaining to plaintiff's physical injuries, if any, so far as the same are shown by the evidence; his suffering in body and mind, if any, resulting from such physical injuries, and such future suffering and loss of health, if any, as the jury may believe from the evidence before them in this case he has sustained or will sustain by reason of such injuries; his loss of time and inability to work and transact business, if any, on account of said injuries, after he has attained the age of 21 years, and such future loss of time and inability to work, if any, which the jury may believe from the evidence he will sustain on account of such injuries (all moneys necessarily expended or become liable for, for doctor's bills, if any, while being treated for such injuries), and may find for him such sum as in the judgment of the jury will be a fair compensation for the injuries he has sus-

tained or will sustain, if any, so far as such damages are claimed and alleged in the declaration."

2. MEASURE OF DAMAGES—*approved form in action for personal injuries.* An instruction upon this subject, as follows, approved:

"The court instructs the jury that if you find for the plaintiff, you will be required to determine the amount of his damage; in determining the amount of damage the plaintiff is entitled to recover in this case, if any, the jury have a right and they should take into consideration all the evidence pertaining to plaintiff's physical injuries, if any, so far as the same are shown by the evidence; his suffering in body and mind, if any, resulting from such physical injuries and such future sufferings and loss of health, if any, as the jury may believe from the evidence before them in this case he has sustained or will sustain by reason of such injuries; his loss of time and inability to work and transact business, if any, on account of said injuries, after he has attained the age of twenty-one years, and such future loss of time and ability to work, if any, which the jury may believe from the evidence he will sustain on account of such injuries, and may find for him such sum as in the judgment of the jury will be a fair compensation for the injuries he has sustained or will sustain, if any, so far as such damages are claimed and alleged in the declaration."

3. INSTRUCTIONS—*when appropriate to authorize recovery for future pain, etc.* An instruction authorizing the allowance to the plaintiff in an action for personal injuries for future pain and suffering is proper where there is evidence tending to show that such plaintiff has not fully recovered from his injuries.

Action in case for personal injuries. Appeal from the Circuit Court of Cook county; the Hon. JOHN L. HEALY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907, Affirmed. Opinion filed November 6, 1908.

HORTON, BROWN & MILLER, for appellant.

ALBERT W. MAY and JOHNSON, BELASCO & McCABE, for appellee; JOEL BAKER, of counsel.

MR. JUSTICE BAKER delivered the opinion of the court.

In an action on the case for personal injuries, alleged to have been sustained by the plaintiff through the negligence of the defendant, plaintiff had judgment and the defendant appealed. The injuries were such as made it necessary to amputate the fingers and thumb of plaintiff's right hand between the first and second joints. As a result of the amputation there are neuromas, nerve tumors, at the points of amputa-

tion which, up to the time of the trial, were tender and painful.

The only ground for reversal stated in appellant's brief is that: "The appellee's third and eighth instructions were each of them erroneous and did not correctly present the law to the jury". Said instructions are as follows:

"3. The court instructs the jury that if you find for the plaintiff, you will be required to determine the amount of his damages; in determining the amount of damage the plaintiff is entitled to recover in this case, if any, the jury have a right and they should take into consideration all the evidence pertaining to plaintiff's physical injuries, if any, so far as the same are shown by the evidence; his suffering in body and mind, if any, resulting from such physical injuries, and such future suffering and loss of health, if any, as the jury may believe from the evidence before them in this case he has sustained or will sustain by reason of such injuries; his loss of time and inability to work and transact business, if any, on account of said injuries, after he has attained the age of twenty-one years, and such future loss of time and inability to work, if any, which the jury may believe from the evidence he will sustain on account of such injuries (all moneys necessarily expended or become liable for, for doctor's bills, if any, while being treated for such injuries), and may find for him such sum as in the judgment of the jury will be a fair compensation for the injuries he has sustained or will sustain, if any, so far as such damages are claimed and alleged in the declaration."

"8. The court instructs the jury that if you find for the plaintiff, you will be required to determine the amount of his damage; in determining the amount of damage the plaintiff is entitled to recover in this case, if any, the jury have a right and they should take into consideration all the evidence pertaining to plaintiff's physical injuries, if any, so far as the same are shown by the evidence; his suffering in body and mind, if any, resulting from such physical injuries and such future sufferings and loss of health, if any, as the

jury may believe from the evidence before them in this case he has sustained or will sustain by reason of such injuries; his loss of time and inability to work and transact business, if any, on account of said injuries, after he has attained the age of twenty-one years, and such future loss of time and ability to work, if any, which the jury may believe from the evidence he will sustain on account of such injuries, and may find for him such sum as in the judgment of the jury will be a fair compensation for the injuries he has sustained or will sustain, if any, so far as such damages are claimed and alleged in the declaration."

The objections urged to these instructions are that they do not require that the assessment of damages be based on the evidence, and that they permit the jury, in assessing plaintiff's damages, to take into consideration future suffering, loss of health and ability to work.

In support of the first objection, counsel cite *Muren Coal and Ice Co. v. Howell*, 204 Ill. 515. The action in that case was by an administrator for wrongfully causing the death of his intestate. The conclusion of the instruction which was held erroneous was as follows:

"And if you believe and from the evidence find the defendant guilty, then it will be the duty of the jury to assess the plaintiff's damages and in doing so you may take into consideration the pecuniary injuries resulting to the widow and next of kin, if from the evidence you believe there is a widow and next of kin, and that they have suffered pecuniary injury or loss on account of the death of said August Schmidt, and give to the plaintiff such a sum as in your judgment will fairly compensate the widow and next of kin for such pecuniary injury or loss, not to exceed, however, the amount sued for in this case."

In so much of said instruction as related to the assessment of damages there was no reference to the evidence; the jury were told that they might give the plaintiff such sum as in their "judgment will fairly

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compensate the widow and next of kin for such pecuniary injury or loss, not to exceed, however, the amount sued for in this case." The instructions in question relate only to the assessment of damages; each contains references to the evidence; and there is in neither any reference to the amount sued for.

In the sixth instruction given for the plaintiff the jury were "instructed that the amount of damages, if any, is a fact you are to determine from the evidence in this case and under the instructions of the court." We think that, taking the instructions relating to the assessment of damages together, the objection that they do not require that the assessment of damages be based on the evidence cannot be sustained.

We think that so much of said instructions as authorized the jury to take into consideration in assessing plaintiff's damages, his future sufferings from his injury and his future inability to labor as a result thereof, was proper under the evidence in the case. Such an instruction is not proper where the plaintiff has fully recovered from his injury and no permanent disability has resulted therefrom (Ill. Iron & Met. Co. v. Weber, 196 Ill. 526); but is proper where there is a permanent impairment of plaintiff's ability to labor, and where the evidence tends to show that he had not recovered from his injuries but was suffering pain by reason thereof at the time of the trial. Chicago & Mil. Elec. Ry. Co. v. Ullrich, 213 Ill. 170.

In this case there was a permanent impairment of plaintiff's ability to labor, and evidence that the stub ends of his thumb and fingers were at the time of the trial tender and painful, and we think there was evidence on which to base the instructions.

In our opinion the instructions complained of are free from reversible error, and the judgment of the Circuit Court will be affirmed.

Affirmed.

Alfred Molway, Appellee, v. City of Chicago, Appellant.

Gen. No. 14,161.

1. **STREETS**—*what ordinary travel.* A person riding a bicycle upon a public street is using it for the purposes of ordinary travel and to such a person a municipality owes the duty to use ordinary care to keep the street in reasonably safe condition.

2. **STREETS**—*how question of exercise of care by municipality determined.* Whether the street in question, with a hole in the roadway a foot or fifteen inches deep, with sloping sides, was or was not reasonably safe for ordinary travel thereon, is a question of fact to be determined by the jury.

3. **VERDICT**—*when not excessive.* A verdict for \$6,000 in an action for personal injuries is not excessive where it appears that as a result of the accident the plaintiff, whose left leg had theretofore been amputated below the knee, sustained a permanent dislocation to the hip of his right leg.

Action in case for personal injuries. Appeal from the Superior Court of Cook county; the Hon. ROBERT W. WRIGHT, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907. Affirmed. Opinion filed November 6, 1908.

Statement by the Court. In an action on the case for personal injuries plaintiff had judgment for \$6,000 and the defendant appealed.

In Wells street, Chicago, was an asphalt pavement. In this pavement there was at the time plaintiff was injured a hole twelve or fifteen inches deep, eighteen inches wide and three feet long. Plaintiff at the time of his injury was fifteen years old. Six years before his left leg had been amputated, three inches below the knee. Not knowing that there was such a hole in the pavement, he rode his bicycle into it, when it was quite dark, was thrown from his bicycle and in his fall sustained the injuries complained of. The hole into which he rode had been in the pavement two or three months before the accident.

EDWARD J. BRUNDAGE and JOHN R. CAVERLY, for appellant; GEORGE L. REKER and EDWARD C. FITCH, of counsel.

HORTON, BROWN & MILLER, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

The defendant asked the court to instruct the jury, "that ordinary travel does not include the use of a street by one riding a bicycle thereon, * * * that a person when riding a bicycle on a street is not using said street for the purpose of ordinary travel thereon", and the court refused to so instruct the jury.

Plaintiff had a right to ride his bicycle in a public street, and a bicycle is a vehicle. N. C. S. R. R. Co. v. Cossar, 203 Ill. 608. It is a matter of common knowledge that bicycles have for many years been in common use on the streets of Chicago and other cities. We think the court did not err in refusing to give said instruction.

The court also refused to give for the defendant the following instruction:

"If you believe from the evidence that the street in question at the time and place of the alleged accident was reasonably safe for ordinary travel thereon by persons riding in vehicles, such as wagons, carriages and other similar vehicles, then you are instructed that you should find the defendant, City of Chicago, not guilty, whether you believe that said street at said time and place was or was not reasonably safe for travel by a person riding a bicycle thereon."

The duty of the city to use reasonable care to keep its streets in a reasonably safe condition for use as a street as a highway, is a general duty owing to all who use the street as a street, as a highway, for travel in ordinary modes. Bicycles are in common use, and the rider of a bicycle in a public street must, we think, be held to use the street as a street for travel in an ordinary mode. It follows that, in our opinion, the instruction was properly refused.

The court for the defendant instructed the jury that

the plaintiff could not recover unless they believed that it had been proven by the preponderance of the evidence, "that the street in question, at the time and place of the alleged accident, was not reasonably safe for ordinary travel thereon by persons exercising due care and caution for their safety", and also that: "A city is not bound under the law to keep its streets absolutely safe, nor is it bound under the law to keep them in reasonably safe condition; it is only bound to use reasonable care to keep its streets reasonably safe for ordinary travel thereon by persons using due care and caution for their own safety." The jury must under these instructions find, in order to find the defendant guilty, that the street in question was not "reasonably safe for ordinary travel thereon by persons exercising due care and caution for their safety."

Whether the street in question, with a hole in the roadway a foot or fifteen inches deep, with sloping sides, was or was not reasonably safe for ordinary travel thereon, was a question of fact for the jury on which their verdict must be held conclusive on us.

It is further contended that the damages are excessive. In his fall from the bicycle, plaintiff's left hip was injured. His left leg had before that time been amputated below the knee. The injuries to his hip consisted of a fracture of the back lip of the acetabulum, the cavity in the hip bone which receives the head of the thigh bone, and a dislocation of the hip joint. As a result the hip joint is fixed, rigid; the thigh bone is shortened one inch, the muscles of the thigh are somewhat atrophied, so that his left thigh is now five inches smaller than his right, and his condition cannot be remedied.

We cannot say that for such injuries, followed by such consequences, the damages are excessive.

The record is, we think, free from error, and the judgment of the Superior Court will be affirmed.

Affirmed.

Lena Schmidt, Appellee, v. Chicago City Railway Company, Appellant.**Gen. No. 14,177.**

1. **VERDICT**—*effect of silence as to one defendant.* A verdict finding one defendant guilty is in effect a verdict in favor of another defendant not mentioned. The defendant so found guilty has no right to have the issues so determined again submitted to the jury, even though such jury has not been discharged.

2. **CUSTOM**—*how question of existence of, determined.* Whether there was a rule, practice or custom giving to the cars of one traction company a superior right of way over the cars of another traction company at a particular crossing, is a question of fact, where the evidence is conflicting, to be determined by the jury.

3. **NEGLIGENCE**—*care required at street crossings.* If the cars of one traction company have no superior right of way to the cars of another traction company at track crossings, the jury is justified in finding that such traction company having no superior right of way was guilty of negligence if its motorman when approaching such crossing saw the car of the other company at a stop and proceeded forward without keeping his car in such control as to enable him to avoid a collision with such other car so standing still if it should suddenly be started up.

Action in case for personal injuries. Appeal from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907. Affirmed. Opinion filed November 6, 1908.

Statement by the Court. In an action on the case brought by appellee against appellant and the Chicago Union Traction Company for personal injuries, plaintiff had judgment against appellant alone, to reverse which this appeal is prosecuted.

Appellant operated a double track electric street railroad in Clark street, and its south-bound cars ran on the west track. There was a viaduct at Twelfth street, about twelve feet high, and a grade or incline from that viaduct to the north, up which the south-bound cars of appellant ran. The Traction Company operated a double track electric street railway in

Twelfth street, crossing appellant's road, at grade, on the viaduct.

Plaintiff was a passenger in a south-bound car of appellant, which came in collision with a west-bound car of the Traction Company at said crossing, and in such collision the plaintiff received the injuries complained of.

WILLIAM J. HYNES, SAMUEL S. PAGE and WATSON J. FERRY, for appellant.

KRUSE & PEDEN, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

We find no error in the rulings of the court on questions of evidence, nor in the refusal of the court to give for the appellant either of the two instructions asked by appellant and refused.

The parties agreed, and the court ordered, that the jury might return a sealed verdict, and the jury separated after signing and sealing a verdict. The envelope was opened at the next session of the court, in the presence of the jury, and found to contain only a verdict signed by the jury finding appellant guilty and assessing plaintiff's damages at \$3,500. When this verdict was read the court said orally to the jury that they, "would have to do something in regard to the other defendant". Appellant's counsel objected to receiving the paper so returned by the jury as a verdict against appellant; and the court overruled the objection. The court then gave to the jury the following instruction in writing: "You must retire to your jury room and determine from the evidence and instruction of the court as to whether or not the defendant the Chicago Union Traction Company is guilty or not guilty, and return a verdict as you may so determine", to which action of the court the appellant objected and excepted. The jury retired and re-

turned a second verdict, signed by the jury, finding the Traction Company not guilty. Objections were duly made by appellant to the acceptance of said verdict or either of said verdicts, and its objections were overruled and exception taken.

The verdict first returned was in effect a verdict in favor of the Traction Company. *Wabash R. R. v. Keeler*, 127 Ill. App. 265. The first verdict disposed of the issues between plaintiff and appellant. We do not think that appellant had the right to have those issues again submitted to the jury, or that it was prejudiced by the action of the court in requiring the jury to retire and find a verdict as to the other defendant only.

Plaintiff remitted \$875 and a judgment was entered for \$2,625 and costs. We do not think that on the evidence the judgment should be reversed on the ground that the damages are excessive.

Appellant contends that at and before the time of the collision there was a rule, custom and practice by which the motormen of the Traction Company stopped its Twelfth street cars on the east side of Clark street going west, and on the west side going east, until any car of appellant that was within 150 or 200 feet of Twelfth street had passed over the crossing; that just before the collision a west-bound car of said Traction Company stopped on the east side of Clark street; that the south-bound car of appellant was then about 150 feet north of Twelfth street; that the motorman in charge of said car had the right to believe and to act on the belief that the motorman in charge of said west-bound car would observe and follow such rule, practice and custom, and not start his car forward until after appellant's south-bound car had passed over the crossing; that so believing, and acting on such belief, appellant's motorman proceeded towards said crossing without attempting to reduce the speed of his car, which was from eight to ten miles per hour, until he saw the Traction Company car start forward;

that his car was about seventy-five feet north of the north track in Twelfth street when said car started forward; that so soon as said car started forward he set the air brakes on his car, but was unable to stop it before it reached the track in Twelfth street, and struck the Traction Company's car.

Twenty-one witnesses called by appellant testified to the existence and observance of such rule, practice and custom, at and for a long time before said collision. Fifteen witnesses called by said Traction Company, most of them motormen in its service, testified that there was no such rule, practice or custom, but that the practice and custom had been and then was for each motorman, for himself, to determine in each case whether it was safe for him to pass over the crossing; that usually a motorman would by a nod or other signal indicate to the motorman of the other company when to proceed.

Whether there was any rule, practice or custom giving to the cars of appellant a superior right of way over the cars of the Traction Company at said crossing was, in our opinion, on the evidence, a question of fact for the jury which must be regarded as settled by their verdict. This conclusion practically disposes of the contention of appellant that the verdict is so manifestly against the weight of the evidence that the judgment should be reversed.

If appellant's cars had no superior right of way at the Twelfth street crossing over the cars of the Traction Company, the jury might, we think, properly find that the motorman of the appellant, when he saw the Traction Company's car stop on the east side of Clark street, ought, in the exercise of that high degree of care, appellant and its servants were bound to exercise for the safety of passengers, reasonably to have anticipated that the Traction Company's car might start forward, and ought, if he attempted to cross in front of that car, to have so regulated the speed of his car, and placed it under such control, that he could

Karczenska v. City of Chicago, 144 App. 516.

have avoided the collision when that car started forward with his car seventy-five feet or further away from the crossing. We cannot say that on the evidence the jury might not properly find that appellant was guilty of negligence.

The record is, we think, free from error, and the judgment of the Circuit Court will be affirmed.

Affirmed.

Antonia Karczenska, Appellee, v. City of Chicago, Appellant.

Gen. No. 14,181.

1. **VARIANCES**—*what essential to constitute fatal.* A variance can only be fatal where there is a clear discrepancy between averment and proof.

2. **NEGLIGENCE**—*non-liability of municipality for latent defects of sidewalk.* The following instruction upon this subject approved:

"You are instructed that the defendant, city of Chicago, is not liable for latent or unseen defects in its sidewalks not discoverable by the exercise of ordinary care; and if you believe from the evidence that the sidewalk in question was, at the time and place of the alleged accident, in a reasonably safe condition for ordinary travel thereon by persons using such degree of care and caution as reasonably prudent persons would use for their safety, under all the circumstances shown by the evidence, so far as was discoverable by the defendant by the use of ordinary care, then you should find the defendant, city of Chicago, not guilty."

But *held*, that its substance was contained in other instructions given and that therefore a reversal should not follow because of its refusal.

3. **VERDICT**—*when not excessive.* A verdict for \$5,000 in an action on the case for personal injuries is not excessive, where it appears that the plaintiff at the time of her injury was a woman of about the age of thirty-five years and had prior to that time been in good health, attending to her domestic duties and keeping boarders, and who as the result of the accident was bed-ridden for fourteen months, after getting up had again to learn to walk and had up to the time of the trial, several years after the accident, been unable to do any work; had her seventh and eighth ribs fractured and the pleura and lung injured and sustained other serious injuries.

Action in case for personal injuries. Appeal from the Superior court of Cook county; the Hon. HOMER ABBOTT, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907. Affirmed. Opinion filed November 6, 1908.

EDWARD J. BRUNDAGE and JOHN R. CAVERLY, for appellant; EDWARD C. FITCH, of counsel.

BRANDT & HOFFMANN, for appellee; OSCAR C. MILLER, of counsel.

MR. JUSTICE BAKER delivered the opinion of the court.

In an action on the case brought by appellee against appellant for personal injuries alleged to have been suffered by her in consequence of the negligence of the defendant in respect to one of its sidewalks, plaintiff had judgment for \$5,000, and the defendant appealed.

When plaintiff rested her case defendant moved, "to dismiss the case on the ground that there was a variance between the place described by the witnesses as the place of the injury and accident and that described and designated in the declaration". The court denied the motion and the defendant excepted. The first count of the declaration was abandoned on the trial. The second count alleged that the defendant, on etc., at etc., "was possessed and had control of a certain public sidewalk on, to wit, Elston avenue, near, to wit, Webster avenue in said city"; that defendant negligently, etc., then and for a long time theretofore had kept said sidewalk out of reasonable repair, full of holes, weak, insecure and insufficient; that while plaintiff was "then and there" with all due care on her part, lawfully passing over and upon said sidewalk, a plank flew up, gave way and tripped the plaintiff, whereby she fell into a certain hole "then and there" in said sidewalk, and fell through and upon the sidewalk, whereby appellee was greatly and permanently injured, etc.

Elston avenue runs nearly northwest and southeast. Webster avenue, an east and west street, runs from some distance west of Elston avenue, east to Lincoln Park, crossing Elston avenue. About 400 feet northwesterly from Webster avenue, measured on the west line of Elston avenue, is Gloy place; and beyond Gloy place is Binzo street, both running southwesterly from, but not crossing Elston avenue. The accident occurred on the sidewalk on the westerly side of Elston avenue, between Gloy place and Binzo street, at a point about 650 feet from Webster avenue, measured on the west line of Elston avenue. There is no street running from the easterly side of Elston avenue between a point opposite to the place where the accident occurred and Webster avenue.

A variance can only be made where there is a clear discrepancy between averment and proof. Here the averment as to the location of the sidewalk alleged to be out of repair is ambiguous, uncertain and indefinite. The difference between the averment and the proof is not clear. In one sense it is true that the sidewalk through which plaintiff fell was "near" Webster avenue. We think that the motion to dismiss on the ground of variance was properly overruled.

The trial court refused to give to the jury for the defendant the following instruction:

"You are instructed that the defendant, City of Chicago, is not liable for latent or unseen defects in its sidewalks not discoverable by the exercise of ordinary care; and if you believe from the evidence that the sidewalk in question was, at the time and place of the alleged accident, in a reasonably safe condition for ordinary travel thereon by persons using such degree of care and caution as reasonably prudent persons would use for their safety, under all the circumstances shown by the evidence, so far as was discoverable by the defendant by the use of ordinary care, then you should find the defendant, City of Chicago, not guilty."

For the defendant the jury were instructed that be-

fore the plaintiff could recover, "they must believe each and all of the following requirements to have been proven by a preponderance or greater weight of the evidence; * * *

"4. That the alleged defective condition of said sidewalk existed before the time of said accident, and that the city either had actual notice of such defective condition in time to have enabled it to repair the same, by the exercise of ordinary care, before the time of said accident, or that such alleged defective condition existed for so long a period prior to the time of said accident as to charge the city with constructive notice thereof — that is to say, that such condition existed for so long a period prior to the time of said accident that the city by the use of ordinary care would have discovered such condition in time to have enabled it to repair the same, by the use of ordinary care, before the time when said accident is alleged to have occurred.

"5. That the city failed to exercise reasonable care to have said sidewalk at the time and place in question in a reasonably safe condition for ordinary travel thereon by persons using due care and caution for their safety, after said city had either actual or constructive notice of such unsafe condition, if you believe from a preponderance of the evidence that such unsafe condition existed and that the city had either actual or constructive notice thereof in time to have enabled it to repair the same, by the exercise of ordinary care, before the time of said accident.

"6. That the plaintiff was injured, as alleged, as a proximate result of negligence on the part of the defendant, as charged if you believe from a preponderance of the evidence that it was so negligent.

"If the plaintiff has failed to establish any one of these requirements by a preponderance or greater weight of the evidence, then you should find the defendant, City of Chicago, not guilty."

We think that the instruction refused should have been given, but that the substance of that instruction is contained in the instruction given, and that the

judgment should not be reversed for the refusal to give said instruction.

The sidewalk in question was some distance above the ground. It was made of boards or plank laid cross-wise on stringers running parallel with the walk. Four witnesses for the plaintiff testified that many of the planks or boards of said walk had for months before that time been loose, rotten and some of them out of place. Plaintiff, in passing over said walk when it was dark, stepped on a board which either tipped up or broke and she fell, her legs going through the hole in the walk and astride a stringer. The accident occurred June 24, 1903. A carpenter called by defendant testified that for the defendant early in May, 1903, he repaired the sidewalk on the westerly side of Elston avenue, between Binzo street and Webster avenue; that he put in some new plank and nailed down some old ones that were loose; that he looked to see if there were any more loose planks and saw none. Two entries from the book of the ward superintendent were introduced by defendant, showing that repairs to the sidewalk were made near Binzo street May 7 and 8, 1903. We cannot, on the evidence in this record, say that the finding of the jury, implied by their verdict, that the defendant was guilty of the negligence averred in the declaration, is against the evidence.

Appellant further contends that the damages are excessive. The trial took place four years after the accident. Plaintiff when injured was about thirty-five years old, and up to that time her health had been good. She had lived with her husband and children and had a number of boarders. She had done the housework, including the washing. She was pregnant when injured. She was taken home in a police patrol wagon and was not able to leave her bed for fourteen months. When she got up she had to learn to walk, and up to the time of the trial had not been able to do any work. In the fall her seventh and eighth

ribs on the left side were fractured and the pleura and lung on that side injured. Four days after her injury she had a miscarriage, and afterwards her menses were irregular and she had a falling of the womb. Two or three months after her injury tuberculosis of the left lung was discovered and continued up to the time of the trial. Not long after her injury a hernia was discovered. In her fall one of her legs was injured, and afterwards varicose veins appeared in that part of the leg.

Whether the injury caused or brought on the tuberculosis and hernia was one of the controverted questions on the trial on which the testimony of the physicians called by the respective parties was conflicting. We do not think that on the evidence in the case the damages awarded by the jury can properly be held excessive.

Finding in the record no reversible error, the judgment of the Superior Court will be affirmed.

Affirmed.

Annie Fuhry, Appellee, v. Chicago City Railway Company, Appellant.

Gen. No. 13,960.

1. NEGLIGENCE—*what establishes prima facie case.* Proof of status as a passenger and an injury resulting from a collision establishes negligence *prima facie* against the carrier and casts upon it the burden of showing that the collision occurred under such circumstances as to exclude its liability; *held*, that the evidence of the carrier as to the "slippery, greasy and muddy condition of the track" did not justify its exoneration from responsibility.

2. EVIDENCE—*how rate of speed may be shown.* The rate of speed at which a car was traveling at or about the time of an accident may be shown by the approximation of witnesses qualified from observation.

3. EVIDENCE—*what, of attending physician, competent.* The tes-

Fuhry v. Chicago City Railway Co., 144 App. 521.

timony of an attending physician as to the physical condition of the plaintiff in an action for personal injuries based upon what he observed and ascertained by the application of tests, is not incompetent by reason of the conclusion being given in part upon the statements of the plaintiff.

4. EVIDENCE—*appropriate form of hypothetical question as to causes of physical condition.* A physical condition *prima facie* established it should be inquired not as to what might have produced it but as to what did produce the condition disclosed.

5. VERDICT—*when not excessive.* A verdict of \$2,500 rendered in an action for personal injuries is not excessive where it appears that before the accident the plaintiff was a strong, healthy, hard-working woman, earning nine to ten dollars per week by washing, that after the accident she became practically an invalid, and that no favorable prospect of recovery from the injuries sustained appears.

Action in case for personal injuries. Appeal from the Circuit Court of Cook county; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed November 12, 1908.

WILLIAM J. HYNES, JOHN E. KEHOE and WATSON J. FERRY, for appellant.

JOHN S. HUMMER and CHARLES A. McDONALD, for appellee.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

The appellant is a street railway company, and operates street railway cars by electric power in South Halsted street, a street lying north and south in the city of Chicago. Between seven and eight o'clock in the morning of May 7, 1903, Annie Fuhry, the plaintiff, became a passenger at Thirty-third and Wallace streets on one of appellant's cars, to be carried south to Forty-seventh street, an east and west street. As the car in which she was riding was approaching Forty-third street, a Mrs. Flynn, who was a passenger on the car, signaled the conductor to stop the car. The conductor gave the signal to stop, and the car slowed and stopped on the south side of Forty-third

street to permit Mrs. Flynn to alight; but before she could do so another of appellant's cars, which was running south in the same track as the car in which plaintiff was riding, and behind that car, crashed into the rear end of that car. The evidence tends to prove that the car in which the plaintiff was riding, and which had stopped, as stated, on the south side of Forty-third street, was driven forward by the force of the collision between fifty and one hundred feet, and that the head of the motorman of the rear car was driven through the front window of his car. The plaintiff at the time of the accident was sitting on the east side of the car, at its rear end, near the rear door. The conductor of the car testified that he saw the plaintiff immediately after the collision lying on the floor unconscious and her face bleeding, and that, with the assistance of another person, he carried her into a shoe store, called a doctor to attend her, and then returned to his car. The evidence tends to prove that the plaintiff was seriously injured. It was nearly eight o'clock A. M. when the collision occurred, and it was proved and admitted on the trial that the day was bright and sunshiny. Anthony Vogt, one of appellant's conductors, testified that he was riding on the front platform of the rear car, and that he saw the car on which plaintiff was stop on the south side of Forty-third street, and that then the front end of the car on which he was riding was about opposite the second door north of Forty-third street and about seventy-five to one hundred feet from the car with which it subsequently collided, and was running at the rate of from eight to ten miles per hour. The evidence for the plaintiff makes a *prima facie* case for her, casting on the defendant the burden of showing that the collision occurred under such circumstances as to exclude its liability. North Chicago St. Ry. Co. v. Cotton, 140 Ill. 486; W. Chicago St. R. R. Co. v. Martin, 154 *ib.* 523, 529, and cases cited.

Appellant's counsel contend that the collision was

caused by the "slippery, greasy and muddy condition of the track", for which the defendant was in no wise responsible, and which "could not have been discovered by any management, however skillful".

Vogt, called by defendant, testified that there was mud on the rail, caused by wagons passing over it, and that the rail was sweaty and the day damp and the rail was as slick as glass, and when the motorman shut off the power and applied the brake, about seventy-five feet from the car which had stopped, the brake had no effect, and the car kept sliding. This witness, on being asked to explain how the condition of the track testified to by him would prevent the wheels from taking hold, answered: "That is owing to the condition of the weather. Some mornings the weather will be fine and the next morning the sun won't come out, you know, until late, and it will come and kind of—I don't know what, kind of an atmosphere, kind of dampness, and wagons going over it will make a kind of mud form on it; when this mud is formed on it cars keep continually going over it without stopping, and the mud will become like glass, and the next man comes along and he tries to make a stop there and applies sand, but the sand won't hold, the wheels will lock and gradually push the sand off, and you can't stop sometimes with a block".

First, as to the weather: It was admitted on the trial by defendant's counsel, after being proved, that the 6th and 7th days of May, 1903, were bright and sunshiny, and that the night between those days was a clear moonlight night. Second, as to the alleged muddy condition of the track: C. A. Halsted, a motorman in defendant's employ, but not operator of either of the cars in question, called by defendant, testified in chief: "I was familiar with the tracks of the Chicago City Railway Company on Halsted street and Forty-third as they existed in 1903; that was a level street along there; the rails of the track were about level with the street; the wagon traffic on that street

at that point is pretty heavy; it is right in front of the Union Stock Yards; the traffic at that time was merely store and meat wagons. Those wagons drove in the tracks of the street car company and crossed them". On cross he testified: "I say there was considerable traffic on the street at that crossing, and that was stock yards traffic. The way that would affect the rail there is in droppings from the wagons, and carrying dirt into the tracks from the outside". This witness further testified: "As a motorman I know that those slippery conditions are apt to be along the track and met with any time. We are usually on guard more or less to avoid collisions, in case of a slippery rail; I mean we are watching, taking observations of every thing around. We run slower and farther apart".

John R. Shirley, a conductor in defendant's employ, called by defendant, testified that the track at the crossing of Halsted and Forty-third streets was slippery; that the motorman on the rear car was an extra man, and that, even if the condition of the track at the crossing, at the time in question was permanent, it would be impossible for him to remember it. He says an extra man is one who works on various lines, one today, another tomorrow, and perhaps still another the next day, and is not as familiar with any particular track as is the motorman running constantly over it. Shirley further testified that the rail was what he called a greasy rail, and came from sweating. Asked what would remove the condition produced by sweating, he said, "The effect of the sun; you see if the sun was shining it would dry it up;" and that he was not sufficiently versed in the matter to answer as to how long it would take to dry it up.

The rear car, which was being operated by an extra motorman, was following the car in which the plaintiff was riding as the latter car was approaching the intersection of Halsted and Forty-third streets, and he was bound to consider that the car in front of him might stop

on the south side of the intersection, in case any passenger wanted to alight from or board it; that it was the duty of those operating it to so stop it, in the event of any one desiring to get on or off it, and it seems clear that it was his duty to keep such a distance behind it as to be able to stop his car in time to prevent a collision, even though his car should run onto a slippery rail, which defendant's witnesses say is liable to happen anywhere along the line, and in respect to which Halsted says, "We are usually on guard more or less to avoid collisions in case of a slippery rail."

In the present case the rear car was moving at the rate of 8 to 10 miles per hour, and when the motor-man of the rear car attempted to stop it, it was only, as Vogt testified, about 75 feet from the car with which it collided.

The verdict of the jury in favor of the plaintiff necessarily includes the finding that the collision has not been so explained as to exonerate the defendant from liability. We think the verdict sustained by the evidence.

Defendant's counsel object to certain rulings of the trial court on evidence, and also claim that the damages are excessive. The ruling on the evidence of Koerber, plaintiff's witness, in respect to the speed of the rear car, is objected to. He testified that, according to his best judgment, it was running about ten miles per hour. In the course of his cross-examination he also testified that he did not know how fast it was running. Defendant's counsel moved to strike out the evidence, that in his best judgment the car was running ten miles per hour, which motion the court overruled. We think that the witness, in saying he did not know, merely intended that he could not state exactly. But even though the court's ruling on defendant's motion was incorrect, we do not think defendant could have been prejudiced by it, because Vogt, defendant's witness, testified that the speed of the car was from 8 to 10 miles per hour.

Dr. Charles McDonald was the plaintiff's attending physician. He was called to attend her the day of the accident and attended her continuously from that time. He visited her one hundred times or more, and examined her for the last time about a week before the trial. He was called to attend the plaintiff on the recommendation of Dr. Mechan, defendant's witness, who testified that Dr. McDonald is a good man and all right. Dr. McDonald testified that, in his last examination of the plaintiff he had her squeeze his hands with both of hers as hard as she could, and found that his left hand, which she held in her right hand, was squeezed with a less degree of pressure than his right hand; also that he stuck a pin in her right arm till it bled, and she evinced no resistance whatever, whereas the left arm responded promptly to the pin pricks; also that he, using a tongue depressor, examined the posterior part of her throat, touching that part, and she did not gag, although the tendency of all patients is to gag under such circumstances. He based certain conclusions on these circumstances.

Counsel for appellant object to this evidence on the ground that it is based on subjective symptoms and self-serving actions of the plaintiff. We think the cases of *City of Chicago v. McNally*, 227 Ill. 14, and *Eckels v. Muttschall*, 230 *ib.* 462, a sufficient answer to the objection. In the last case the court say: "Dr. Ide had treated the plaintiff from the time of his injury and had examined him a few days before the trial. He testified fully to the physical conditions he found in the plaintiff immediately after the injury, also just prior to the trial. He stated that the plaintiff was lame, that he had curvature of the spine and degeneration of the spinal cord. The fact that the doctor, in arriving at his conclusions, was guided somewhat by what the plaintiff said to him, did not make his evidence incompetent and subject to be stricken out on the motion of the defendants."

The following question and answer occurred in the examination of the witness:

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"Q. To what do you attribute the condition of nervous hysteria that this woman is suffering from, in view of your treatment and what you have learned of her case; to what physical condition do you attribute it?" "A. Due to the injury that she received in her head and the concussion and nervous shock at that time."

It was objected that this evidence was incompetent, on the ground that it was for the jury to decide whether the accident produced the condition described. The same objection to similar evidence was made in *City of Chicago v. Didier*, 227 Ill. 571, and this case is like that in that the manner of the injury is undisputed. The court say: "The reason given for permitting a properly qualified witness to give his opinion as to what did produce certain results or consequences, and not what might have produced them, is, that the fact to be established is what did cause the conditions found to exist. Where the determination of that question involves scientific knowledge or skill which is possessed only by those who have given the matter special study and with which the jurors and others engaged in the ordinary avocations of life are unfamiliar, a witness possessing the necessary qualifications may be asked for his opinion as to what did cause the conditions described."

It is contended that the sum awarded by the jury as damages, \$2,500, is excessive. The evidence tends to prove that before the accident the plaintiff was a strong, healthy, hard-working woman, and that she earned nine to ten dollars per week by washing, and that ever since the accident she has been practically an invalid, and Dr. McDonald testified that the prospect or chance of her recovery from her ailments is very unfavorable. In view of the evidence as to the injury and the consequences of it to the plaintiff, we cannot sustain the contention that the damages are excessive.

The judgment will be affirmed.

Affirmed.

Frideborg A. Anderson, Appellant, v. Nels O. Hultberg et al., Appellees.

Gen. No. 14,710.

INJUNCTIONS—when appeal does not lie. An appeal does not lie from an order granting an injunction upon compliance with a condition specified in the order.

Bill for injunction. Appeal from the Circuit Court of Cook county; the Hon. CHARLES M. WALKER, Judge, presiding. Heard in this court at the March term, 1908. Appeal dismissed. Opinion filed November 12, 1908. Rehearing denied November 30, 1908.

E. ALLEN FROST, for appellant; JOHN J. HEALY, of counsel.

WINSTON, PAYNE, STRAWN & SHAW and HARRIS F. WILLIAMS, for appellee.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from an interlocutory order granting an injunction. Appellant is defendant to a creditor's bill, which she answered, and filed a cross-bill, praying, among other things, that the appellees be restrained and enjoined from further prosecuting a bill in equity in the Circuit Court of the United States for the District of Kansas, until after the hearing of the original bill filed in the Circuit Court of Cook county. The motion of the appellant for a temporary injunction, as prayed, was referred to a master, who states, in his report, substantially correctly, as we find from the pleadings, the alleged facts on which the motion is based, which statement is as follows:

"The original bill herein, which was filed July 1, 1904, is a creditor's bill based on a money decree recovered by the original complainants against Peter H. Anderson, while indebted to the complainant. Among other things, it charges that said Peter H. Anderson,

while indebted to the complainants, and with moneys which in equity belonged to them, purchased and caused to be conveyed to his wife certain specifically described lands situate in Dickinson county, Kansas, which conveyance was made to hinder and delay said Anderson's creditors. The bill seeks to have said land in Dickinson county, Kansas, subjected to the payment of said decree. Upon said bill an injunction was issued, restraining Mrs. Anderson from selling, assigning and conveying said Kansas land or any portion thereof.

"During the month of September, 1907, and during the pendency of the original bill filed in this court, Nels O. Hultberg, one of the original complainants herein, having meanwhile as trustee for said Covenant, obtained a judgment in a state court in Kansas upon the basis of said decree against Peter H. Anderson, filed a creditors' bill in the Circuit Court of the United States for the District of Kansas, First Division. This bill named Mrs. Anderson, the cross-complainant here, as a defendant, and made substantially the same allegations and prayers regarding said land in Dickinson county. Neither Mrs. Anderson nor her husband has been served with process in said creditors' bill pending in Kansas, nor has either of them entered an appearance therein, but notice has been published requiring Mrs. Anderson to appear in said cause, in default of which a decree *pro confesso* would be entered against her in said cause on the first Monday in March, 1908.

"Mrs. Anderson's cross-bill further alleges that her defenses to said bill pending in Kansas are the same as her defenses to the original bill in this cause, and that to defend both suits would subject her to double expense."

The court, in accordance with the recommendation of the master, entered an order in reference to the prayer for a temporary injunction as follows:

"And further, in accordance with the recommenda-

tions of said master's report, it is hereby ordered that the motion of the cross-complainant, Frideborg A. Anderson, for a temporary injunction as prayed in her cross-bill be and the same is hereby conditionally granted, to the extent only that the defendants in said cross-bill be and they are hereby conditionally enjoined from further prosecuting only so much of that certain bill in equity pending in the United States Circuit Court in Kansas more particularly described in said cross-bill, as involves the lands in Dickinson county, Kansas, described in said cross-bill; provided, however, that the injunction hereby granted shall be vacated, annulled and wholly for naught esteemed unless said Frideborg A. Anderson shall at or before 10 o'clock A. M. of Wednesday, March 18, 1908, deliver to Chicago Title and Trust Company, an Illinois corporation, a deed properly executed and acknowledged by herself and Peter H. Anderson, her husband, conveying to said Chicago Title and Trust Company, as trustee, said lands situate in Dickinson county, Kansas, and specifically described in said cross-bill, in trust, to hold the title to said lands subject to such disposition thereof as may be made by the final decree of this court upon the original bill herein; such deed also to contain the further provision that in case such final decree upon the original bill herein should direct said Chicago Title and Trust Company to convey said lands to the complainants in the original bill herein or their assigns, such conveyance shall stand in satisfaction of so much of the money decree on which the original bill herein is founded as this court by its said final decree may determine the then value of said lands to be."

This is the order appealed from. The appellees moved to dismiss the appeal, on the ground that the order is not appealable, which motion was reserved till the hearing.

Appeals from interlocutory orders granting injunctions can only be taken by virtue of the statute entitled "An act to provide for appeals from inter-

locutory orders granting injunctions or appointing receivers", in force July 1, 1887. Section 1 of that act provides, "That whenever an interlocutory order or decree is entered in any suit pending in any court in this State, granting an injunction, or overruling a motion to dissolve the same, or enlarging the scope of an injunction order, or appointing a receiver, or giving other or further powers or property to a receiver already appointed, an appeal may be taken from such interlocutory order or decree to the Appellate Court of the district wherein is situated the court granting such interlocutory order or decree."

Appellant's complaint is that the court did not grant an absolute order as prayed, but only on the conditions specified in the order. It is manifest from the language of the statute, quoted *supra*, that no appeal is allowed or can be taken from an order refusing an injunction. If an appeal is not allowed from an order refusing altogether an injunction as prayed, it necessarily follows that an order refusing in part an injunction as prayed, as is the case here, is not appealable. Appellant prayed an absolute preliminary injunction, which the court refused, in effect, but granted the injunction in part and on the conditions prescribed in the injunction order. The statute, section 1, also provides: "The force and effect of such order or decree, and the proceedings in the court below, shall not be stayed during the pendency of the appeal". This provision is in favor of the party on whose motion the injunction order is granted, and clearly contemplates only an appeal by the party against whom the order runs. We are of opinion that the appeal from the injunction order by appellant is not within the statute and does not lie.

By the conditional part of the appeal bond, the appeal purports to be not only from the injunction order, but also from an order taxing against appellant the sum of \$200 as the master's fees. No appeal was prayed or allowed from this order. Assuming the order as to

the master's fees to be a final order and appealable, in respect to which any expression of opinion is unnecessary, an appeal could only be taken from it on an allowance of an appeal by the court, and the filing of an appeal bond in such penalty and within such time as the court should, by order, prescribe, and with security approved by the court, or by the clerk, if the court should so order, which the court did not. This course was not pursued. The only appeal bond in the transcript of the record, which is certified to be complete, is a bond approved by the clerk, as provided by the statute in case of an appeal from an interlocutory order. Therefore, no question as to the order that appellant should pay \$200 as master's fees is before us.

Appellees' motion to dismiss the appeal is sustained, and the appeal will be dismissed.

Appeal dismissed.

John Chrystal, Appellee, v. John S. Level, Appellant.

Gen. No. 13,979.

1. **AMENDMENTS AND JEOPAILS**—*when granting of leave after verdict ground for reversal.* To grant an amendment after verdict which changes the form of the action and the measure of damages applicable, without giving leave to reply and retry the case, is so harmful to the defendant as to require a reversal.

2. **MEASURE OF DAMAGES**—*in action of fraud and deceit.* In an action for fraud and deceit the measure of damages is the difference in value between the property purchased and its hypothetical value had the facts represented been true.

3. **MEASURE OF DAMAGES**—*in action upon rescinded contract.* In an action upon a rescinded contract the measure of damages is the cash consideration paid for the property acquired or the value of the security exchanged for such property.

4. **JUDICIAL NOTICE**—*of what taken.* Judicial notice will be taken of territorial distances in a municipality within the territorial jurisdiction of the court.

Trespass on the case. Appeal from the Superior Court of Cook

Chrystal v. Level, 144 App. 533.

county; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1907. Reversed and remanded. Opinion filed November 12, 1908.

Statement by the Court. This is an appeal from a judgment of the Superior Court of Cook county for \$5,000, in favor of John Chrystal, the appellee here and plaintiff below, against John S. Level, appellant here and defendant below.

The judgment had its source in the following pleadings and proceedings:

February 9, 1905, John Chrystal began a suit in the Superior Court against John S. Level, filing therein a declaration and securing the issuance of a summons.

Both declaration and summons were expressed to be in "a plea of trespass on the case," the words "upon promises" being erased from the printed form of summons and not appearing in the declaration. The declaration alleged no promise, express or implied, but averred deceit and fraud of the defendant to the injury of the plaintiff. It alleged that:

John S. Level was interested in a corporation known as "Chicago Stock Yards & Transit Company," and was desirous of causing the plaintiff, John Chrystal, to buy a hundred shares of stock in it and to cause him to pay for it five thousand dollars, and on the — day of May, 1903, "contriving and intending to deceive and defraud the plaintiff and wrongfully, deceitfully and fraudulently induce, persuade and encourage him, the plaintiff, to buy and purchase said shares of stock * * * he, the defendant, falsely, fraudulently and deceitfully then and there asserted and represented to the plaintiff in substance that the said corporation was then and there the owner in fee simple of a certain large amount or quantity of land, to-wit, twenty-five acres, by means of which said false, fraudulent and deceitful assertion and affirmation he, the defendant, did then and there fraudulently and deceitfully induce, persuade and encourage the plaintiff to buy and purchase one hundred shares of stock of said cor-

poration aforesaid, and to pay therefor a large sum of money, to-wit, five thousand dollars;" that the plaintiff, "confiding in and giving credit to the said assertion and representation of the defendant and believing the same to be true and not knowing to the contrary thereof, did afterward, to-wit, on the day aforesaid, buy and purchase one hundred shares of stock of said corporation aforesaid, and did pay therefor the sum of \$5,000; whereas, in truth and fact at the time of the defendant making his said assertion and representation the said corporation was not the owner in fee simple of, to-wit, twenty-five acres of land, but on the contrary thereof was then and there the owner of, to-wit, ten acres"; that "the defendant when he made his said assertion and representation well knew the same"; that "the said shares of stock so purchased by him" (the plaintiff) "as aforesaid are of no use or value to the plaintiff and the plaintiff is likely to lose said five thousand dollars" * * * "to the damage of the plaintiff in the sum of five thousand dollars, and therefore he brings his suit."

October 10, 1905, an alias summons against Level, who had not been found by the officer on the first one, was taken out, which described the action as a "plea of trespass on the case" simply, and which was returned served.

A general and special demurrer (the special cause assigned being that no specific act of negligence or wrongful conduct was charged) was filed by the defendant to the declaration. This demurrer was overruled and the defendant Level then pleaded the general issue, "that he was not guilty of the said supposed grievances above laid to his charge, or any of either of them", etc.

February 7, 1907, the cause was called for trial before a jury. After the evidence for the plaintiff had been presented and the plaintiff had rested, counsel for defendant moved to strike out the evidence of and for the plaintiff on the ground that the declaration was at

variance with the proof; that the declaration alleged the procuring by deceit of a single purchase in May, 1903, of 100 shares of stock of The Chicago Stock Yards & Transit Company for \$5,000, and the proof showed two transactions—one in June and one in July—each involving, not a purchase for money, but an exchange of certain bonds of the Cicero and Proviso Railroad for sixty shares and forty shares respectively of the stock of the Stock Yards Company.

Thereupon the plaintiff's counsel moved for leave to amend the declaration to fit the evidence. The court allowed this cross-motion and denied the motion of the defendant. Thereafter, before this case went to the jury, the plaintiff filed an amended declaration.

This amended declaration was "in a plea of trespass on the case" and was identical with the original declaration save that after the allegation that the plaintiff did purchase one hundred shares of the stock of the corporation, there was inserted the averment that he "paid therefor the sum of five thousand dollars in the following manner, to-wit: by delivering to the defendant five certain bonds of the Cicero & Proviso Street Railway Company of the par value of one thousand dollars each, to be and were sold by the defendant at the par value thereof, to-wit, five thousand dollars, received by the defendant in payment for said stock, and the interest which had then and there accrued on said bond credited to the account of the plaintiff;" and that the final allegation was that the corporation was possessed of "no land" instead of "ten acres".

The counsel for the defendant, at the close of the plaintiff's evidence, moved for a peremptory instruction urging that in an action for fraud and deceit including a purchase like the case at bar, the measure of damages is the difference between the actual value of the property purchased and its hypothetical value had it been as represented, and that the plaintiff had presented no evidence of the actual value of the stock, and consequently none of damage to the plaintiff.

This motion was denied, and the counsel for defendant proceeded to put in evidence, but after some evidence was in, moved for a continuance of said cause on the ground that he had been taken by surprise, and that he was not ready to proceed with the trial of the cause on the amended declaration because he was unable to produce any evidence at that time as to the value of the five bonds described in the amended declaration at the time of their alleged delivery to the defendant; that he did not know where the said bonds were, nor whether or not they had any value; that it was absolutely impossible for him to obtain this information at the time of making the affidavit, but that he believed that in the future he would be able to obtain "all information in reference to the value and whereabouts of said bonds and what was done with the same."

The motion for a continuance was denied by the court, and the defendant then renewed his motion for a peremptory instruction. This was refused and the cause was then argued to the jury by both sides.

The jury on February 8, 1907, returned a verdict for five thousand dollars in favor of the plaintiff.

On the same day the defendant moved "that said verdict be set aside and that a new trial be granted in said cause." This motion was continued from time to time until the fourth day of May, 1907. On that date, before the disposition of the motion of the defendant for a new trial, the plaintiff moved that "the action be changed from that of case to assumpsit", and that the plaintiff be given leave to file an amended declaration *instanter* in certain words and figures set forth in said motion.

This motion was opposed by the defendant, but his objection was overruled by the court and an order was entered changing the action from case to assumpsit and giving plaintiff leave to file the second amended declaration as presented, to the entry of which order the defendant excepted.

The second amended declaration then filed was "in a plea of trespass on the case on promises," but was otherwise like the first amended declaration up to the allegation that the corporation was not at the time of the sale of said shares the owner in fee simple of twenty-five acres of land, but on the contrary thereof was in fact at the time the owner of no land, from which allegation it proceeds: "which fact the defendant then and there knew, whereby the said shares of stock then and there were of no value to the plaintiff, and the plaintiff thereafter, on the discovery of the falsity of said assertion and representation, did tender back to the defendant said shares of stock, by means whereof the defendant then and there became liable to pay to the plaintiff on request the amount of said bill, and being so liable, the defendant in consideration thereof then and there promised the plaintiff to pay him the said amount on request". Then follow the consolidated common counts in *indebitatus assumpsit* and the allegation that "in consideration of the premises the defendant promised the plaintiff to pay him said several sums of money mentioned, but had neglected so to do."

The motion for a new trial was then overruled and also a motion subsequently made in arrest of judgment, and judgment was entered on the verdict against the defendant for \$5,000.

From that judgment the defendant has appealed to this court, filing herein assignments of error which cover the points he argues, which are: that the filing of the amended declaration of May 4, 1907, after the cause had been submitted to a jury and a verdict returned, was erroneously permitted, that the said amended declaration was based upon a rescission of the contract described therein, while the original cause of action had been stated to be a claim for damages for fraud and deceit in inducing the contract; that beginning the suit in case for fraud and deceit, filing the original and first amended declarations and prosecut-

ing the cause on those declarations against the plea of "not guilty" thereto, to the verdict of a jury, was an affirmance of the contract, which forbade the rescission thereof, or a judgment based on a rescission thereof; that the statutes and practice of this State only admit amendments to plaintiff's pleadings which "enable the plaintiff to sustain the action for the claim for which it was intended to be brought"; that in the case at bar the claim for which the suit was originally intended to be brought was for damages by the fraud and deceit in procuring a contract which plaintiff affirmed, and not a claim for the value of the consideration in a contract which the plaintiff disaffirmed; that in any event if the trial court had the power after verdict to allow the change in the form of the action and the amendments to the pleading which it did, it abused its discretion in doing so over the objection of the defendant, except on condition of a new trial and the allowance to the defendant of the right to plead anew to the second amended declaration; and, finally, that the verdict is without support in and is against the evidence in the case submitted to the jury, and that a new trial should therefore have been granted on the merits of the case, independently of the action of the court in allowing the amended declaration after verdict.

LOUIS T. ORR, for appellant; WILLIAM E. CLOYES and HARVEY L. CAVENDER, of counsel.

JAMES L. BYNUM and CHARLES C. SPENCER, for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

The judgment in this case must be reversed and the cause remanded for a new trial.

We do not think it necessary to decide in this appeal the point, vigorously insisted on by the defendant, that the amendment made under the order of May 4,

1907, in the form of the action by the substituted declaration then filed was not in the power of the court to allow, because of a prior election by the plaintiff between affirming and rescinding the original contract for the purchase of stock in the Chicago Stock Yards and Transit Company.

It seems to us a tenable theory that the evidence might show on a fair trial of this cause under the last amended declaration, that the election, if one was necessary, between affirmance and disaffirmance was made in favor of the latter by the plaintiff before he brought any suit at all.

If that were so, then the argument of the defendant that the election, once made, could not be revoked, would be inconsistent with the theory that the mistaken pleading first filed fixed rights which could not be affected even by the dismissal of the one suit and the beginning of another. And we are not prepared to hold that if such an election were shown by the evidence to have taken place before the suit was begun, it would not be, under the liberal spirit of our amendment laws, an amendment in furtherance of justice, and one "enabling the plaintiff to sustain the action for the claim for which it was intended to be brought," to change the pleading to the extent it was done in this case.

But we are clear that the defendant did not have a fair trial of the issues raised by the amended declaration. He could not have had it with the change of the form of action and the consequent entire change of the measure of damages, without an opportunity, which was here absolutely denied him, of repleading and of retrying his case.

[The measure of damages in the action for fraud and deceit was undoubtedly the difference in value between the stock purchased and its hypothetical value had the company owned the twenty-five acres of land which, as it was alleged, it was falsely represented to own.] If no evidence or insufficient evidence of either of these

values was offered for the plaintiff, the defendant had a right to rely on that fact in trying the issues and to rely on it not only before the jury but before this court on an appeal.

On the other hand, the measure of damages in the case stated by the amended declaration, which was for the recovery of the consideration paid on a rescinded contract, was the value of the bonds which the plaintiff exchanged for the stock. It was the right of the defendant on this case to show the value or the want of such value in these bonds, which would have been immaterial in the original case.

These considerations, it seems to us, prevented its being within the discretion of the learned trial judge to allow the amendment at the stage of the proceedings at which it was allowed, without granting a new trial.

While this is sufficient to dispose of the case, we deem it proper to say that we should not have been satisfied with the verdict or judgment on the record as it stands, even had the amended declaration been on file when the case was tried before the jury.

The case made by the plaintiff is a peculiar one. Although for many years he had been engaged either as a principal or employe in the brokerage business, dealing in stocks and bonds, although he was one of the original subscribers to the capital stock of the new enterprise known as the Chicago Stock Yards & Transit Company, and although he was one of the directors of the corporation and was present at its meetings, he says that he was content to take, as sufficient reasons for turning over his bonds for certain stock in the company, the statements of the defendant—first, that the company owned twenty-five acres of land; second, that that land was “from 52nd avenue to 48th avenue and from 39th street to the Drainage Canal” (which tract, we can take judicial notice, is half a mile long, and while of varying widths at least in such width more than a sixth of a mile on the average, and certainly nearer sixty than twenty-five acres, as plaintiff

iff could easily have seen on any map); third, that the twenty-five acres so situated—seven or eight miles southwest from the Court House—on which he saw “a few pens” and “a man cutting grass,” were worth \$200,000, or \$8,000 an acre, although on record was a deed, of which he produced a copy in evidence, dated four months before the transaction in question, from the Ogden Estate to the defendant, of five acres of it for \$5,000.

All this may be true, and the trial judge’s somewhat doubtful supposition that the plaintiff might get the jury to believe it seems to have been realized; but we think at least on such a basis the other evidence necessary to establish the damages claimed by the plaintiff should have been clear. We do not think it was so.

We can find no sufficient evidence in the record of the value of the stock or of the bonds which were exchanged for it. As we have said, the value of one or the other was an essential factor in the measure of damages whether the contract were considered affirmed or rescinded.

The par value of the bonds is indeed in evidence and an implication that the defendant said he would take them at their face in consideration of the stock being treated as worth fifty cents on the dollar, but this is not sufficient as proof of the cash value of either bonds or stock on either theory. The transaction was an exchange at nominal prices.

Nor do we find sufficient evidence that the company does not own the land that the defendant is alleged to have said it did. Deeds on record showing that ten acres had been conveyed to it, and the absence of any other deeds to it from record may furnish ground for such a supposition, but are hardly evidence sufficient to found this verdict on. Record is not an essential element in ownership.

This cause should be retried, and the judgment is reversed and it is remanded to the Superior Court for that purpose.

Reversed and remanded.

**Frank Suchomel, Appellee, v. James Maxwell et al.,
Appellants.**

Gen. No. 13,997.

1. **MASTER AND SERVANT—when rip saw defective.** A rip saw is defective where because of the want of a board or cover thereto the wood and slivers fly in the face of the operator.

2. **MASTER AND SERVANT—when doctrine of assumed risk does not apply.** A servant does not assume the risk of injury from a defective machine where he has continued at work at such machine not beyond a reasonable time under a promise of his master to repair; the servant has a right to rely upon such a promise when made with respect to a simple device if the machine as a whole was so dangerous that he would not have been justified in himself undertaking to make the repairs.

3. **MASTER AND SERVANT—who vice principal.** A servant who is the medium of communication between the master and his servants, who was the proper person to make repairs when requested and who had the power to dismiss a servant requesting such repairs, is a vice principal within the meaning of the law.

Action in case for personal injuries. Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed November 12, 1908.

Statement by the Court. This is an appeal from a judgment for \$5,000, in favor of Frank Suchomel, the appellee here and plaintiff below, against James Maxwell and Henry B. Maxwell (copartners under the name of Maxwell Bros.), appellants here and defendants below, rendered May 18, 1907, by the Circuit Court of Cook county.

The judgment was entered on the verdict of a jury in an action on the case for personal injuries.

The injury sued for was the loss of sight in one eye. This loss was caused, according to the allegations of the declaration, by the flying of a sliver or particle of wood with great violence against the eye, from a circular rip saw which the plaintiff, while in the employ of defendants (who are the proprietors of a box

factory in Chicago), was as such employe operating for said defendants.

The declaration in its first count alleges that it was the duty of the defendants to maintain the said saw in a safe, suitable and well constructed condition for the safety of their employes thereon employed, but that the said saw was, through the carelessness and negligence of the defendants, defectively constructed and maintained, in that "there was no sufficient guard, hood, apron, or other safeguard to protect the person operating the said saw from the sliver of wood, sawdust and other dangerous articles and pieces of substance that were apt to fly from said saw while in motion and strike upon and against the said person so operating said saw, which rendered the operation of said saw dangerous."

This count then alleges the ignorance and inexperience of the plaintiff in that danger and the knowledge of the defendants thereof, and of the danger incident to the operation of the saw, and an order from the defendants, through their foreman, to the plaintiff to operate said saw "without giving the said plaintiff sufficient instructions as to the condition of the saw and the manner of operating the same, and without supplying the said saw with a proper hood, apron, or other safeguard," etc., and in consequence the subsequent accident.

The second count of the declaration alleges in addition that the plaintiff complained to the foreman "that the saw was unsafe and defective in that it was not supplied or equipped with any hood, apron, guard or other safety appliance to keep the slivers and other particles of wood from being thrown upon and against the plaintiff while he was operating the said saw," and requested the foreman "to repair the defects and remove the danger," which the foreman promised to do by equipping the saw with proper safeguards within a reasonable time, ordering the plaintiff to continue operating the saw in the meanwhile, and that in obedi-

ence to the foreman's orders and relying on his promises, and in the exercise of reasonable care, the plaintiff continued in the operation of the saw until the happening of the accident.

After the rendition of the verdict the defendants moved for a new trial, which was denied. Judgment having been entered on the verdict, this appeal followed.

In this court the errors assigned and relied on in argument are based entirely on the denial of a new trial. It is insisted that the verdict was unsupported by and against the weight of the evidence, and in consequence should have been set aside. Complaint is also made that the court erred in refusing to strike out the testimony of the plaintiff on direct examination, that "a piece of wood flew up and hit him in the eye," because on cross-examination he answered that he knew it was a piece of wood that hit him in the eye only because while he was operating the saw and a board was going through the machine he was struck in the eye and his eye crushed; that he grabbed for the board that was going through and got it, and he and a fellow workman standing by saw where the sliver or piece was missing from it. He had testified on cross-examination that splinters, sawdust and wood were continually flying from the revolving saw while he was operating it.

A defense urged in the trial below of a release from the plaintiff to the defendants is not insisted on in the appeal.

J. C. M. CLOW and F. J. CANTY, for appellants.

JOSEPH SABATH and LAWRENCE W. POTTER, for appellee; QUIN O'BRIEN, of counsel.

MR. JUSTICE BROWN delivered the opinion of the court.

The evidence in this case is amply sufficient to show

that while the plaintiff was as an employe of the defendants operating a rip saw at their factory, which is a large manufacturing plant with many machines operated by steam power, a flying sliver or piece of wood from the board he was guiding through the machine flew up and struck his right eye, causing the total blindness thereof. It is unnecessary for us to discuss the objection noted in the statement prefixed to this opinion, to the testimony of the plaintiff to this fact. That testimony is as simple and direct as it could well be made, and leaves no doubt of the fact. Of course no serious doubt is held or suggested. The trial judge committed no error in his rulings on evidence. Nor, as we read the evidence, does the point made that the plaintiff was guilty of contributory negligence need discussion from us. The propositions seriously insisted on in objection to the verdict, are that the evidence fails to show any other danger connected with the rip saw in question, than that necessarily usual and incident to the operation of such a machine; that this ordinary danger the plaintiff was fully cognizant of and assumed when he went to work on the rip saw, and that no sufficient case of a complaint and promise to repair was made out by the plaintiff, to take the case out of the doctrine which would impute to him an assumption of the risk.

This last proposition is based by the appellants on the theories: (a) That the evidence does not show that the machine was defective in any way; therefore, it is said that no complaint on plaintiff's part and no promise on defendants' part would be material; (b) that it was on account of the inconvenience alone that complaint was made by the plaintiff, not on account of the danger, and therefore no effect should be given to it as altering his status in assuming the risk; (c) that the appliance desired and promised was of so simple a nature and construction that the promise to repair does not fall within the rule which exempts the servant from the assumption of risk on such a promise. On

this branch of the argument is cited Webster Manfg. Company v. Nisbett, 205 Ill. 273, and Bowen v. Chicago and Northwestern Railway Co., 117 Ill. App. 9; (d) that the person to whom the plaintiff made his complaint and from whom he received the promise was not a foreman or vice-principal, but a mere fellow workman, without authority to receive the complaint or make the promise.

With the first proposition of the defense, that the evidence shows no other danger connected with the saw than that necessarily incident to such a machine, we are not in accord.

We think that the evidence shows that because of the want of a board or cover to the machine, the wood and splinters so constantly flew in the face of the operator that it could not but be called defective. It was not reasonably safe. Whether this was the result of the breaking of a cap formerly on the machine, as seems to be implied in some testimony in the record, or of originally defective construction, is not material. Swift & Co. v. O'Neill, 187 Ill. 337.

As the Supreme Court said in Morden Frog Works v. Fries, 228 Ill. 246, a servant not only assumes all the usual and known dangers incident to his employment, but also takes upon himself the risk arising from defective tools and machinery, if after the employment he knows of the defect and voluntarily continues in the service without objection.

But as the court also said in that case: "The law, however, creates an exception or modification of that rule where the servant, after acquiring notice of a defect, gives notice of the same to the master and the master promises to remedy the defect."

There is in the case at bar no doubt from the evidence that such a notice was given by the plaintiff to one Hovorka, whom the plaintiff styles "the foreman," and that Hovorka had promised that the defect should be supplied.

Apart from the question of the authority and posi-

tion of Hovorka, which we will hereinafter discuss, the defendants rely on "exceptions within this exception." They say that the exception does not apply to promises to repair simple, ordinary tools, and that the machine involved, or its desired hood at least, was such a simple implement.

The machine operated by the plaintiff must be considered as a whole. It was a machine saw operated by steam power, and belting, and a machine in many different directions proverbially a dangerous and serious thing to meddle with, and we think what the Supreme Court said also in the Morden Frog Works case (*supra*), "The work of the plaintiff with this machine was not the performance of ordinary labor with simple and ordinary tools," is applicable to this case.

But the defendants say also that the exception does not apply if the complaint made is not founded on apprehended danger, but on the workman's convenience or the interests of his employer in the doing of the work. This position is borne out by the Supreme Court in the Morden Frog Works case, but we think that in the case at bar, as in that case, the evidence fairly tended to prove that the complaint of plaintiff was on account of an apprehension of danger to himself.

The evidence of the plaintiff on direct examination was that after he had worked a few days he told the "foreman" that the shavings and sawdust and splinters were flying up in the air, and that he must put something over; that the "foreman" then promised to do so; that the plaintiff then worked a couple more days; that then he again told the "foreman" that "he had to fix it," and the "foreman" said he would fix it; that an hour thereafter the accident happened. On cross-examination he said that the first day he worked, owing to the direction of the wind the sawdust and splinters flying "didn't seem to hurt him any", but that afterward he spoke to the "foreman" about them three separate times; that at the second time, as at the other times, the "foreman" said he would "fix it" for him,

and that at the third time (the day the accident happened) he, the plaintiff, told the "foreman" that if he didn't fix it, he, the plaintiff, wouldn't come back in the afternoon; and he says "I wouldn't have come to work in the afternoon."

This is practically all the evidence on the complaint and promise; and again we think the language of *Morden Frog Works v. Fries* (*supra*) is applicable: "Counsel are also right in the position that the complaint must be on account of some danger to himself apprehended by the servant; but the evidence fairly tended to prove that the complaint of plaintiff was on account of an apprehension of danger to himself. There is nothing in the evidence to indicate that it was made in the interest of the defendant or because the machine did not do good work on account of the defect."

By the instructions of the court it was left to the jury to say, from the evidence, whether the rip saw was reasonably safe or not; whether the defendants knew of the alleged defect or by ordinary care would have known of it, whether the alleged defect increased the danger to the plaintiff in doing his work, and whether on that ground the plaintiff complained of the alleged defective condition, and whether the alleged defective condition was the proximate cause of the accident, and we see no reason for differing from the jury in the decision of these questions shown by their verdict.

It was also left to the jury to say whether the complaint, if made, was made to the authorized agent of the defendants, and whether a promise to remedy the alleged defect was made in response thereto by an authorized agent of the defendants, whether the plaintiff was induced by said promise, if made, to continue at the work, and whether the plaintiff received the injury in question before a time had elapsed after said promise reasonably sufficient to do the work of remedying the alleged defect.

We fail also to see any reason for finding fault with the decision of the jury on these points.

The plaintiff was a Bohemian and spoke Bohemian only, knowing only a few English words. He had several Bohemian fellow-workmen, and, as he says, one Frank Hovorka, who was a Bohemian, "did all the talking with them." There were, he says, two other "foremen," who were English and could not speak Bohemian, but that Frank Hovorka was the man who used "to fix" all the machines and keep them in order; that he was "foreman" of the machine hands; that he told the "foreman" when a machine hand was unsatisfactory and the "foreman" would let him go; that all the Bohemians looked to Frank Hovorka and did what he told them to; that it was Hovorka who put him, the plaintiff, to work on the rip saw in the first place, taking him from a planer for that purpose.

Although witnesses for the defense testified that Hovorka was not a "foreman" for the defendants, they do not deny the essential matters of his representation of the defendants and his acting for them as indicated by the testimony for the plaintiff. He certainly was the only medium of communication between the defendants and the plaintiff; he was the proper man to make repairs which the plaintiff requested; he had power to dismiss the plaintiff had he been unsatisfactory, and power, which he exercised, to change his work from a less to a more hazardous employment.

If not a "foreman," *eo nomine*, he was as to the plaintiff a "vice principal" and an authorized agent of the defendants, to whom the complaint was properly made and whose promise to repair must be considered the promise of the defendants.

We see no error in the record justifying a reversal of the judgment of the Circuit Court, and it is accordingly affirmed.

Affirmed.

William Bochat, Appellee, v. Charles T. Knisely, Appellant.

Gen. No. 14,007.

1. **EVIDENCE**—*effect of admission of counsel.* Where an attorney during a trial of a cause makes admission of a particular fact in issue, he is thereafter estopped to deny such fact, and no proof thereof is required.

2. **VERDICT**—*when not disturbed as against the evidence.* A verdict which is not against the clear preponderance of the evidence will not be set aside on review as against the weight of the evidence.

3. **VERDICT**—*when not excessive.* Held, that a verdict for \$10,000 rendered in an action on the case for personal injuries was not excessive where it appeared that mental and brain trouble of a permanent character ensued as a result of the injury in question.

4. **NEGLIGENCE**—*when doctrine res ipsa loquitur does not apply.* A workman engaged in and about the construction of a building is not entitled to claim the benefit of the doctrine *res ipsa loquitur* if he is injured by reason of being struck by a falling brick; but, held, in this case, that the evidence justified a verdict finding negligence in the defendant where such a workman was so injured.

5. **INSTRUCTIONS**—*what not oral, within meaning of law.* A court may orally withdraw an instruction which it has read to the jury and may likewise orally direct the jury to disregard the instruction so read.

6. **INSTRUCTIONS**—*when not error to refuse leave to present additional.* When the jury is about to retire to consider of their verdict, it is not error for the trial court to refuse to permit counsel to prepare and present an additional instruction in lieu of a bad instruction which the court has first read and then orally withdrawn from the consideration of the jury.

Action in case for personal injuries. Appeal from the Superior Court of Cook county; the Hon. WILLIAM H. MCSURELY, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed November 12, 1908.

Statement by the Court. This is an appeal by Charles T. Knisely, the defendant below, from a judgment of ten thousand dollars rendered by the Superior Court of Cook county against him on July 18, 1907, in favor of the plaintiff below, William Bochat. This

judgment was based on the verdict of a jury in a personal injury suit, a motion for a new trial and one in arrest of judgment having been previously overruled by the court. The suit was originally begun against John A. Knisely, Charles T. Knisely and Richard W. Knisely, co-partners as Knisely Bros., and the declaration, which is in one count, avers that on or about July 19, 1905, the plaintiff was employed by the Falkenau Construction Company as a laborer, and was working for them in the performance of the duties assigned him about a certain building at the intersection of Twenty-second and Fisk streets in Chicago, on which building the Falkenau Company had a contract to perform certain work; that the defendants (John A. Knisely, Charles T. Knisely and Richard W. Knisely) were partners, doing business under the name of Knisely Bros., had a subcontract to do certain work on said building, and were working on it; that while the plaintiff was about said building, in the exercise of due care and caution for his own personal safety, the said defendants "did knowingly, carelessly, negligently and unlawfully cause and permit a certain heavy vitrified paving brick or stone substance to fall from an upper story of said building and strike the plaintiff with great force and violence upon the head, whereby" he was severely injured.

To this declaration all three of the defendants filed a joint plea of the general issue (not guilty), but before the case was reached for trial the defendants John A. Knisely and Richard W. Knisely had died. When a jury was called their death was suggested by the plaintiff's attorney and it was ordered that the said cause proceed against the defendant Charles T. Knisely.

When the first witness called to the stand for the plaintiff—a bricklayer employed by the Falkenau Construction Company—was asked by counsel for plaintiff if he knew what firm or people were putting in the window-frames of that building and the win-

dows, the counsel for the defendant—then representing of course only Charles T. Knisely—interrupted with the statement: “We admit that we did; they were put in by Kniselys; we were putting those in.” This admission was afterwards repeated when another witness was on the stand. In the further conduct of the case there were frequent allusions in the evidence and pleadings to “the Knisely men”, meaning the men working for Knisely Bros. on the windows and window-frames, but no question was mooted on either side, of the membership of the surviving defendant in the contracting firm of Knisely Bros., or of the constituent membership of that firm.

After the evidence was all in and the cause had been argued by the jury, certain instructions which had been prepared and tendered to the court by the plaintiff and defendant for that purpose, were read by the court to the jury—twelve in all. These instructions were then delivered to the bailiff, together with certain exhibits received in evidence. While the jury were retiring to their room, and before the bailiff had delivered the instructions to the jury, the trial judge recalled the jury from the jury room and said to them: “Gentlemen of the jury, the court has given you an instruction which I shall read to you, and then after I read it through I will make an announcement concerning it”.

The judge then read the instruction numbered “5” of those tendered by the defendant, and made this oral statement to the jury:

“The court gave that instruction to you, gentlemen, but since giving it the attention of the court has been directed to this instruction, and the court is now convinced that that is not a correct statement of the law, and that it would have been error to give you that certain instruction, so the instruction will be withdrawn from you and you will give it no consideration whatever, considering it as if it had not been given to you and as if you had not heard it at all. That is all.”

Thereupon the court, in the presence of the jury, erased the word "Given" on the said instruction, and the following annotation was made thereon:

"Instruction withdrawn, jury recalled, and instructed to disregard same.

McSURELY, Judge."

And the said instruction was thus withdrawn from the jury and from the instructions which had been previously given. To all of these proceedings the defendant objected and excepted. The defendant's counsel then asked leave of the court to prepare and tender another instruction covering the degree of care owing by the defendant to the plaintiff, but the court refused to allow this on the ground that it was too late, saying: "The theory is that you have handed in all the instructions that you desire to be given"; and "You would not have known that I refused it" (alluding to the instruction which was withdrawn) "until I had given the instructions".

The defendant excepted to the court's ruling "in refusing to receive and consider a further instruction on the degree of care to be exercised by the defendant".

In this court the assignments of error cover, and there have been argued, these objections to the judgment: That the declaration did not state a cause of action; that the verdict on which the judgment is based is unsupported by the evidence and is against the weight of the evidence, and that a peremptory instruction for the defendant as asked should have been given.

The evidence is alleged to be insufficient to show that employes of Knisely Bros. were at the time of the accident handling bricks at the place from which the brick in question fell, and that if there be any evidence tending to show this, it is rebutted by a preponderance of evidence to the contrary.

It is said that the "doctrine of *res ipsa loquitur*" does not apply, and that without the application of

that doctrine there is no evidence which proves negligence against any one.

It is also urged that the burden was on the plaintiff to prove that Charles W. Knisely was a partner in the firm of Knisely Bros., and that this burden was not carried. Further it is insisted that certain instructions tendered by the defendant and refused by the court were erroneously refused. Also that the damages were excessive.

It is also insisted that the words addressed to the jury when the defendant's instruction five was withdrawn constituted an oral instruction contrary to the statute and a fatal erroneous proceeding. A further error, it is claimed, was committed when the court refused to allow the defendant to prepare and present an additional instruction in lieu of the one withdrawn.

FRANK M. COX, J. F. DAMMANN, JR., and WEISENBACH & MELOAN, for appellant.

B. J. WELLMAN, for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

The chief grounds of objection urged against the verdict and judgment in this case—so far as the sufficiency and weight of the evidence go—are, first, that there is no evidence that Knisely's men were handling or using brick at the window from which the brick in question fell upon the head of the unfortunate plaintiff; and, second, that if they were, there is no evidence that their negligence caused the brick to fall, and that in the absence of such proof a conjecture or supposition of the jury that this was the cause furnishes no justification for the verdict.

A vigorous argument is made in insistence on the first of these propositions, but on analysis of the testimony bearing on it we do not see but that the jury were at liberty to decide, as they evidently did, that at the time the brick fell on the plaintiff two men in the

employ of Knisely were working at the southerly window on the second floor on the east side of the building, and that they were then using bricks of the kind that fell, and had two or three at least on the window-sill either to stand on or to rest a window-frame upon.

The circumstances of the accident were these: The plaintiff, William Bochat, was a laborer and had been a hod carrier for many years when it happened. On the day, July 19, 1905, he was employed by the Falkenau Construction Company, who had a contract for the entire construction of a building for the Commonwealth Electric Company, on the southwest corner of Twenty-second and Fisk streets, in Chicago. His duties consisted of carrying cement in a bucket from a cement trough situated about twenty feet east of the building, to the basement where a cement floor was being laid. As he with a bucket of cement was about to enter a basement window midway between the main easterly entrance of the building and the southeastern corner thereof, at about three o'clock in the afternoon, he was struck on the head by a brick falling from above, cutting his head, making him partially unconscious and entailing other results to be noted when the damages awarded by the jury are discussed.

The brick was of the kind which was being laid to make an acid-proof floor on the second floor of the building. It was a vitrified brick, two inches thick, four inches wide and six inches in length and weighed at least nine pounds. Immediately above the basement window through which the plaintiff was making his entry when struck, was a window in the second story of the building. There were no windows situated above the basement except in the second story, in which there was one south of and of course above the main entrance, and one north and above the main entrance. They are respectively denominated in the testimony the "southeast" and "northeast" windows. The walls of the building and the roof were com-

pleted—the roof being of tar and gravel. There were no other places from which the brick could have fallen, except the southeast window and the roof. There is absolutely nothing in the record to indicate that the latter possibility is of any significance. It is only a possibility in the sense of its being conceivable. The evidence must, to all reasonable minds, show with certainty that the brick fell from the southeast window in the second story. It was of the same distinctive character and description as those were, which, at the very time of the accident, a subcontractor under the Falkenau Co., named Rosenbaum, with three of his men, were laying on the second story as a floor, and no one else was or had been using that kind of brick in the construction of the building.

One George Laughlin, who was a witness, saw the accident. He was a bricklayer and a foreman for the Falkenau Construction Company at the time. He was about four feet from the plaintiff when the latter was struck. He had come out of the building as the plaintiff was entering the basement. Laughlin had just been in the second story, talking with the chief engineer and building overseer of the Commonwealth Edison Company, the owner of the building. While there, a few minutes only before the accident, as he testifies, his attention had been directed to two workmen who were working on the southeast window, "putting glass in", as he says. These men he afterwards saw when, shortly before the accident, he went up again to investigate the matter. They were at that time moving their tools and paraphernalia, he says, from the southeast window to a window in the south wall. The men whom this witness refers to were, it is evident from other evidence, William Shaw and Harry Bowler (glaziers in the employ of the firm of Knisely Bros.), who alone were working on windows on the second floor on that day, and it is to the negligence of one or both of these men that the accident must be imputed, to hold the defendant liable.

A point is made in argument that the connection of the defendant with the firm of Knisely Bros. was not conceded or proved, but we do not regard this contention as needing detailed discussion. Knisely Bros. had the subcontract for the construction of the windows, and at the time of the trial Charles T. Knisely was the only surviving one of these persons made defendant in this action. Counsel therefore only represented him when twice during the trial, defending on the merits, he expressly admitted that "We had the contract for the windows." "We" must have referred to and included his client, and we consider the admission sufficient to estop any contention here made that the defendant was not proven a member of the firm of Knisely Bros., even if under the implications of the opinions in such cases as *Pennsylvania Company v. Chapman*, 220 Ill. 428, and *Chicago Union Traction Company v. Jerka*, 227 Ill. 95, it was open to the defendant to raise the questions after having pleaded the general issue to the declaration—a point which we do not decide.

The question, therefore, whether the defendant was, in contemplation of law, handling or using brick at the window from which the brick which did the injury fell, is the question whether Shaw and Bowler, or either of them, were in the course of their employment so using it.

The testimony on this point before the jury was directly and irreconcilably in conflict.

Shaw and Bowler were both witnesses. Each swore to the same story, and each said that at the time of the accident he was cutting glass, standing on the second floor by a ladder on the north wall of the building, and were not at any window; that they had been glazing windows up to within an hour or less of that time, but had since then ceased that work; that they had been working at the southeast window during the forenoon, coming around to it from the windows in the south wall which they had first glazed, but had ended their work there before the whistle blew at noon; that

at 12:30, when they renewed their work, it was at the northeast window, but that they had concluded that work some time after two o'clock and had been trimming glass by the north wall for at least half an hour, when Laughlin came to them and inquired about the accident that had just happened. Moreover, they testified that at no time either in the morning or afternoon, at either southeast, northeast, or any other window, did they use or meddle with any brick or put any brick on the window-sill or see any brick on the window-sills of either window on the east side of the house. Bowler testified that he saw brick lying on the sills of the windows in the south wall; that he saw the employes of Rosenbaum, who had the contract for laying the floor, lay them there.

But in contradiction of this testimony Laughlin testified that ten minutes before the accident, while on the second floor talking with Davidson, he saw the two Knisely men working at the southeast window putting glass in, and that after the accident, when he went up there, they were at a window in the south wall, preparing to put glass in at that window.

Charles Wright testified that he was a roofer, employed, however, at the time of the accident, by Rosenbaum in putting in the brick floor; that he and his fellow workmen laying the floor were twenty-five feet or so back from the window; the room was a large one—820 square feet—and that neither Rosenbaum nor his men had anything to do with the windows or any occasion to put bricks in the windows; but that at the time of the accident he saw the Knisely men working around some one of the windows—whether the southeast or northeast window, he could not be sure.

Jacob Rybrandt testified that he was a hod carrier working for the Falkenau Company; that immediately—two or three minutes—before the accident, looking up at the building he saw two men working in the southeast window with the window-frame, and that on

each corner of the window-sill was a brick on which these men were resting the window-frame.

Gustav Jadke, who was a fellow workman of the plaintiff, testified that a couple of minutes before the plaintiff was injured he saw two men (whom he identified as witnesses sitting in the next room, and who, from all the circumstances proven in this case, must have been Shaw and Bowler if any body) working on the southeast window.

Finally, Rosenbaum, the flooring contractor, testified that the two men (whom he identified in the court room), Shaw and Bowler, were at the time of the accident working on one of the windows on the east side of the building; that half an hour before the accident he noticed that they had placed three bricks on the window-sill, one on another, and that in working on the window one of the men was standing on a horse or scaffold which had been placed on the floor, and the other on these bricks in the window-sill, "for the purpose", he says, "of putting in the various trinkets that is necessary, chains and so forth and catches * * * in order to reach up"—"to get on a kind of level, where he could get a purchase". He further testified that he had cautioned these men to be careful; that some time afterward he heard some one cry out from below; that at the same moment he saw the men jump from the scaffold (whether they jumped first from the brick onto the scaffold, he did not know) and run; that they ran by him and left the floor and did not return for half an hour or so, when they came back to the same window to work and worked on that window until quitting time.

The importance and significance of Rosenbaum's testimony are vigorously attacked by the defendant, not only because of the witness' interest in exonerating himself and employes from liability, but because, after testifying that the Knisely men were working "on the windows on the east side of the building at the time of the accident", in answer to the question,

"Which window?" he replied, "If my memory serves me right, it is the northeast window"; and afterwards, on cross-examination, as the defendant's counsel claims, "strongly reiterated the statement that they were in the northeast window".

This was all proper argument for the jury, against the significance of Rosenbaum's testimony, for the brick undoubtedly fell from the southeast window; but we are not of opinion that the jury were without the right to believe, from all the testimony taken together, that Rosenbaum was testifying truthfully, but was confused as to direction or mistaken in the single matter of the identity of the window, or that we have the right to set aside their verdict because they apparently entertained this view.

Rosenbaum was first asked (Rec. 56) where the Knisely men were working, and answered "on the windows on the east side of the building". Asked "Which window?" he replied, as stated, "If my memory serves me right, it is the northeast window".

Later he said on direct examination (Rec. 58): "The moment that they heard the cry from below they jumped off the scaffold and run around me. I was standing—let us see—I would be facing south at that time, standing sideways, like this." (Illustrating.) "Just in this way I was standing". The court said, "That is not south". "A. No, south, *this way*—well, I was facing east and they run behind me". This apparently showed a little confusion as to directions.

When later still, on direct examination (Rec. 59), he was asked by counsel for plaintiff: "At the time these men left the window and ran away—what is your best recollection as to which window it was—whether it was the one on the southeast corner or the northeast corner", the question was objected to by the defendant and excluded. Two other questions by counsel for plaintiff, looking to a possible change in the witness' recollection of further thought, were likewise objected to by defendant's counsel and ruled out.

The witness did on cross-examination (Rec. 69 *et seq.*) say that the men on their return to the floor went to work on "that northeast window", and afterward the counsel for defendant referred to "that northeast window" in various questions and received affirmative answers, but it is evident from the whole trend of the cross-examination that it was probably more the question whether the window to which the men returned to work after the accident was the same which they left at its occurrence, than the identity of that window, that was called to the attention of the witness and was in his mind at this time. At all events, all the testimony, contradictory and inconsistent even as between the witnesses on the same side, as it may be, was for the jury to reconcile, weigh and compare, and it is not a case in which the clear preponderance of the evidence is against the conclusion to which the jury arrived on this branch of the case.

But a more serious question, to our minds, is whether, it being conceded that the evidence was sufficient to establish the use of bricks in one of the manners indicated by the witnesses for the plaintiff on the window-sill of the second floor, by the employes of the defendant, it was sufficient to justify the jury in inferring the negligence of these employes, resulting in the accident.

The defendant, rightly, we think, contends that strictly the doctrine of *res ipsa loquitur* does not apply to this case, but nevertheless, we cannot say, on a careful consideration and analysis of the testimony in the record, that the jury were not justified in inferring, not conjecturing or guessing, but legitimately inferring from it, that the defendant's workmen placed the brick which did the damage in a dangerous position for their own convenience; that having placed it there, they neglected to use and handle it carefully enough to prevent its fall to a place where the plaintiff had business and the right to be, and that they realized

this and admitted it by their actions when the accident occurred.

It is not a very different case in principle from those discussed in *Sheridan v. Foley*, 58 N. J. Law, 230; *Melvin v. Pennsylvania Steel Co.*, 180 Mass. 196; *Armbright v. Zion*, 108 Iowa, 338; and *Dixon v. Pluns*, 98 Cal. 384; nor even from that in *Hunt v. Hoyt et al.*, 20 Ill. 544; and we do not think should be decided differently.

Holding, therefore, as we must, that the evidence is not insufficient to justify the finding of the jury on the issues involved, we do not find the other questions difficult. Chief among them is that raised by the contention of the defendant that the withdrawal of the defendant's fifth instruction was equivalent to an oral instruction forbidden by the statute. We do not think so. We think the principle of decision must be found rather in the case of *C. & E. I. R. R. Co. v. Zapp*, 209 Ill. 339, than in *Daily v. Boudreau*, 231 Ill. 228. The instruction was not in the hands of the jury. It was simply in process of transmission through the hands of the bailiff. We do not see any essential difference from the Zapp case. As for the instruction itself, it was plainly bad. We do not think the court abused its discretion in refusing to delay the withdrawal of the jury to enable the defendant's counsel to prepare another. We think that the jury were properly instructed, and that there was no error in the refusal of those instructions offered by the defendant, which were refused. They were, we think, under the circumstances of this case, likely to mislead the jury.

The plaintiff was where he had a right to be. He was not a servant of defendant. The declaration makes allegations covering this, and they were proven. The declaration charges, the evidence tended to show, and the jury found that it did show, that the defendant, by his employes, through negligence, caused a brick to fall on the plaintiff's head while he was in

Town of Cicero v. Grisko, 144 App. 564.

that place. We think the declaration stated thus a cause of action, and that propositions concerning the existence of a duty on the part of the defendant to "protect" plaintiff had no proper place among the instructions. Nor do we think there was any evidence tending to show that the danger of the accident was a risk assumed by the plaintiff, as one of the refused instructions would imply. *Langan v. Enos Fire Escape Co.*, 233 Ill. 308, is not without bearing on these features of the case.

The damages are large, but there was evidence of mental and brain trouble resulting from the blow. An expert testified that the condition of the plaintiff was, in his opinion, permanent; that it would not be bettered, but would probably become worse. It is very hard to estimate damages under such conditions. Undoubtedly the earlier cases in this state cited by the defendant's counsel tend to fortify his contention concerning the amount of this verdict. But later ones that are familiar apply a more liberal rule. On the whole, we do not think the amount of the damages shows passion or prejudice or requires interference at our hands.

The judgment of the Superior Court is therefore affirmed.

Affirmed.

Town of Cicero, Appellee, v. Louis Grisko et al., Appellants.

Gen. No. 14,457.

1. CITIES, VILLAGES AND TOWNS—*presumption as to validity of anticipation warrants.* The presumption in the first instance is that anticipation warrants issued by a town are legal and valid.

2. CITIES, VILLAGES AND TOWNS—*what constitutes funds coming into possession of town treasurer.* Held, under the evidence in this

case, that anticipation bonds issued by the town of Cicero were not merely bailed to a depository of the treasurer which subsequently failed but were warrants actually cashed by such depository and were funds which came into the possession of such treasurer for which he and his surety were accountable to the town.

3. CITIES, VILLAGES AND TOWNS—*when report of treasurer operates as estoppel.* Reports of a town treasurer showing cash in his hands operate to estop both himself and his surety from interposing by way of defense that such cash was on deposit with a bank which bank was insolvent at and before the time of the giving of the bond by such surety and that such loss resulted from the failure of such bank.

4. REVENUE—*what constitutes levy.* It is not the extension of the tax by the county clerk that constitutes a levy upon which the legal issuance of anticipation warrants is predicated; the appropriation bill of the proper authorities of the municipality is the levy.

5. LACHES—*upon what defense of, cannot be predicated.* Failure to take legal action which must necessarily have failed, does not constitute laches.

6. BONDS—*when demand not essential to maintenance of action upon.* In an action upon a bond of a town treasurer to recover money reported by said treasurer to be in his possession, a demand prior to suit need not be shown; the bringing of the suit is itself a sufficient demand.

7. INTEREST—*what constitutes an account stated.* In an action upon the bond of a town treasurer to recover an amount shown as in his hands by reports made by him, interest is properly allowed upon the ground that such reports constituted an account stated.

Action in debt. Appeal from the Municipal Court of Chicago; the Hon. JOHN H. HUME, Judge, presiding. Heard in this court at the March term, 1908. Affirmed. Opinion filed November 12, 1908.

RUNNELLS, BURRY & JOHNSTONE, for appellant.

JOHN J. SHERLOCK and HIRAM T. GILBERT, for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

The appellee, the Town of Cicero, on a trial before the Municipal Court of Chicago, without a jury, recovered by the consideration of that court on January 22, 1908, a judgment in debt, chancerized at \$55,288.80, against the appellants, Louis Grisko and

the Metropolitan Surety Company. From that judgment this appeal is prosecuted.

Louis Grisko was supervisor of the Town of Cicero and therefore, by the charter of said town (Section 5 of the Act of March 25, 1869, revising charters of Cicero) treasurer of the same from some time in April, 1904, until May 20, 1907, when his successor, one Kasperski, who was elected during the month preceding, qualified and assumed office.

The supervisor's term of office was one year, but Grisko, who was originally elected in April, 1904, was re-elected in April, 1905, and again in April, 1906. His duties and obligations as treasurer are defined by Section 5 aforesaid, as follows:

"The Supervisor of said town shall be ex officio the Treasurer of said town, and he shall receive and hold all moneys belonging to the town arising from general or special tax, special assessments, fines, penalties or otherwise, and he shall, upon entering upon the duties of his office, execute a bond to the Town of Cicero, in such sum and in such sureties as shall be determined by the board, conditioned that he will faithfully account for all moneys that may come into his hands, and will pay the same over pursuant to the provisions of law or the orders or resolutions of the board, and that he will faithfully perform the duties of his office. It shall be his duty to keep a correct account of all moneys received and paid out by him, and when required, to furnish from time to time to the board a statement of the moneys in his hands, and he shall receive such compensation as such Treasurer as shall be allowed him by said board, not exceeding two per cent upon all moneys received by him."

During Grisko's first and second terms The American Surety Company was surety upon the official bond presented and filed by Grisko.

On April 16, 1906, Grisko and the appellant, the Metropolitan Surety Company, executed and on April 17, 1906, the Town of Cicero accepted from Grisko a bond in the following terms:

“Know all men by these Presents: That Louis Grisko of the Town of Cicero, County of Cook and State of Illinois, as principal, and The Metropolitan Surety Company of New York, a corporation duly authorized to transact business in the State of Illinois, as surety, are held and firmly bound unto the Town of Cicero, county of Cook and State of Illinois, in the penal sum of One Hundred Thousand Dollars (\$100,000), for the payment of which well and truly to be made, the above named obligors hereby bind themselves and their respective heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Signed, sealed and executed this Sixteenth day of April, 1906.

The condition of this obligation is such; that whereas, the above bounden Louis Grisko was on the 4th day of April, A. D. 1906, duly elected to the office of Supervisor of said Town of Cicero, in the County of Cook aforesaid, for the period of one year.

Now Therefore, if the said Louis Grisko shall faithfully account for all moneys that may come into his hands as such Supervisor and pay over the same pursuant to the provision of law or the order or resolution of the Board of Trustees of the Town of Cicero, and shall faithfully perform the duties of his office to the best of his skill and ability, then this obligation to be void, otherwise to remain in full force and effect.

LOUIS GRISKO,

The Metropolitan Surety Company,

[SEAL.] CHARLES G. FREEMAN,

Resident Vice President.

WALTER FARADAY,

Resident Assistant Sec.”

On June 3, 1907, Grisko, through one Mr. Buckley, the Town Clerk, whom he, being an illiterate man, employed and paid as his clerk and bookkeeper, presented to the Board of Trustees of Cicero a document purporting to be and entitled,

“REPORT OF LOUIS GRISKO, TREASURER OF THE TOWN OF CICERO. JAN. 1ST TO MAY 20, 1907.”

This report Mr. Grisko testified in this case was to

the best of his knowledge correct, and that it was made and presented by his authority and direction, although he did not sign it, nor was asked to do so.

It begins with a recapitulation of the subsequently detailed figures of receipts and expenditures, and this recapitulation has for its first item a debit to the Treasurer of \$92,646.09 as the amount on hand December 31, 1906, at which date a prior report had been made by him to the Board showing that amount on hand. It appears in this form:

“Balance Dec. 31st, 1906, \$92,646.09.”

This is followed by items representing receipts by the Treasurer from “the sale of Tax Warrants,” receipts from the Town Collector on the account of taxes and otherwise, and some interest on deposits. The whole amount of debits is \$175,433.39. On the other side of the account in the recapitulation is a variety of items describing payments by the Treasurer on various accounts to the amount of \$117,614.34, and the final entry, “To Balance, \$57,819.05,” making, with the credited payments the sum of the debits, \$175,433.39.

Beneath this balancing of the account is the memorandum:

“Balance in Lincoln Bank now defunct, from sale of appropriation tax warrants years 1905 and 1906, \$53,490.91.

Balance cash on hand, 4,328.14.

Total, \$57,819.05.”

As implied by this memorandum it appears that although (as is stipulated in the record) “upon said 20th day of May, A. D. 1907, it became and was the duty of Grisko to pay over to Kasperski as his successor in office, all moneys which had come into the hands of said Grisko as Supervisor, or which had not been paid out by him pursuant to the provisions of law or the order or resolution of the Board of Trustees of the Town of Cicero, or which had not otherwise been law-

fully accounted for by him," the money was not available to him to thus turn over the stated balance of \$57,819.05. He turned over instead only \$4,328.14, and reported as to the balance, amounting to \$53,490.91, that it was a deposit in Lincoln Bank, a private bank in the Town of Cicero (at Morton Park), which had been before August, 1905, owned and operated by William W. Weare, doing business as William W. Weare & Co., as a banking house under that name, but in that month had been transferred to one William J. Atkinson, who changed its name to the "Lincoln Bank." Atkinson took possession of the Bank on October 1, 1905. He seems to have paid Weare for it with practically all the good assets in the Bank, substituting for them some worthless bonds of a water company in which he was interested. The public were presumably not aware of this, and the deposits shown on the books of the Bank increased from thirty or forty thousand dollars to over a hundred thousand. Atkinson re-deposited the money received in a Chicago Bank and carried there assets or securities received, and then made loans at that Bank, which, when the end of this species of financiering came, with the closing of the doors of the Lincoln Bank and the appointment of a receiver in bankruptcy for Atkinson on December 17, 1906, were apparently sufficient to absorb the funds and collateral on deposit and leave only enough assets in the estate to pay the bankruptcy expenses.

Because of the failure of Grisko to pay over to his successor the entire amount shown by the report above described to be chargeable to him, this present suit was begun against him and the surety upon his last official bond, the Metropolitan Surety Company. The action was in debt, and the declaration set forth the bond and its breach in that "while the said Louis Grisko was the Supervisor of the plaintiff large sums of money * * * belonging to the plaintiff came into the hands of Grisko as such Supervisor, for which

said Grisko did not faithfully account and did not pay over the same * * * to his successor, * * * but * * * neglects and refuses" so to do, etc.

To this declaration Grisko and the Company filed four pleas: First, *nil debet*; second, *non est factum*; third, that Grisko "has at all times faithfully accounted for all moneys that came into his hands as Supervisor * * * and paid over the same pursuant to the provisions of law or the order or the resolution of the Board of Trustees of the Town of Cicero, and faithfully performed the duties of his office to the best of his skill and ability, according to the true intent and meaning of said writing obligatory," and fourth, that if "the plaintiff has been damnified for or by reason or means or on account of any failure of said defendant, Louis Grisko, to pay over any or all moneys belonging to the plaintiff which came into the hands of the said Louis Grisko as Supervisor, etc., the said plaintiff has been so damnified of its own wrong and through its own means and default, to-wit, that the said Louis Grisko paid over all the moneys that came into his hands as said Supervisor, pursuant to the provisions of law, by the order or resolution of the Board of Trustees of the Town of Cicero, to the Lincoln Bank of Morton Park, Illinois, or to other person or persons designated by said Board, and, so did faithfully account for all moneys coming into his hands as such Supervisor."

A demurrer was sustained to the first plea. On the second issue was joined, and to third and fourth replications were filed traversing their allegations that Grisko had (a) faithfully accounted; (b) paid over all the moneys that came into his hands, pursuant to the provisions of the law or the order or resolution of the Board of Trustees of the Town of Cicero, etc.; (c) faithfully performed the duties of said office of Supervisor to the best of his skill and ability according to the true intent of said bond;—and tendering issue on each of the propositions stated.

On the trial, as before stated, the court found for the plaintiff and assessed its damages against both the defendants at \$55,288.80, and after overruling a motion for a new trial and a motion in arrest of judgment gave the judgment herein appealed from.

The defense which was made below and is repeated here on the assignments of error is divided into these propositions:

A. That over \$48,000 of the \$53,490.91 described in the Report of Grisko to the Town Board of June 3, 1907 (which with interest at 5 per cent. from May 20, 1907, to January 22, 1908, is the amount of the judgment herein), should not be charged against Grisko as "moneys that had come into his hands as Treasurer," and that therefore its loss is not covered by his official bond.

Under this general proposition it is urged (1) that the report in question does not estop Grisko, and still less the surety on his bond, from showing the true nature of the debit this charged to him,. (2) That such showing is that the sum of \$48,340.96 out of the \$53,490.91 reported as in the Lincoln Bank was simply the aggregate face amount of certain so called "anticipation warrants" issued by order of the Board of Trustees of the Town of Cicero, and placed by order of the same Board (not even through the official action of the Treasurer) in the hands of the Lincoln Bank—not as money, but simply as paper of the Town. (3) These "anticipation warrants" were illegally issued by the Town and as they were illegal and given to the Lincoln Bank by the Town, any money which the Lincoln Bank allowed or credited on them to the Treasurer or otherwise, if it did so credit it, was not money coming into his hands as Treasurer in purview of his official bond. The illegality of the warrants depends on the fact (a) that they were unnecessary to defray the ordinary expenses of the Town and consequently unauthorized by the statute; and (b) that they were not issued against "taxes already levied," which was a requisite to their validity under the statute.

It is further insisted that the Town was guilty of laches barring recovery because after the failure of the bank it took no steps to stop payment of the warrants.

B. That a large part of the loss occurred before the Metropolitan Surety Company became surety. For such loss the Company is not liable. No estoppel arises from Grisko's reports made to the Board of Trustees and filed with the Town Clerk, of the balances on hand April 17, 1906, June 30, 1906, October 1, 1906, December 31, 1906, and May 20, 1907, because Grisko was not a defaulter, did not consciously render a false report and did not deceive the Town.

C. That a demand was necessary before bringing suit, and none was made.

D. That the judgment asked for and rendered is too large, because (1) the Surety Company should have been allowed a credit of \$6,858.84 on account of the general town warrants cashed or paid by the Bank just prior to its failure, and for which the Bank has not been re-imbursed. This amount it is claimed should be credited against the liability on the bond—wiping it out altogether if the "anticipation warrants" are not included in it—and reducing it by \$6,858.84 if they are. (2) Interest on the balance reported as of May 20, 1907, should not have been allowed.

The facts on which these defenses are predicated are these:

By the charter of the Town of Cicero (Private Laws of 1869, vol. 3, p. 666) the government and corporate powers of the town are vested in and exercised by a board of seven trustees. Of these the Supervisor is one *ex officio*, he and the Assessor and Collector with four other persons elected as Trustees making up the seven. This Board has by the charter "the general management and control of the finances and all the property, real, personal and mixed, belonging to the town."

By an act of the legislature approved May 31, 1879,

and amended May 11, 1901, it is provided "That whenever there is not sufficient money in the treasury of any county, city, town, village, school district, or other municipal corporation, to meet and defray the ordinary and necessary expenses thereof, it shall be lawful for the proper authorities thereof to provide a fund to meet said expenses by issuing and disposing of warrants drawn against and in anticipation of any taxes already levied by said authorities for the payment of the ordinary and necessary expenses of such county, city, town, village, school district, or other municipal corporation to the extent of seventy-five per centum of the total amount of any such tax levied; provided, that warrants drawn and issued under the provisions of this section shall show upon their face that they are payable solely from the taxes when collected and not otherwise; and shall be received by any collector of taxes in payment of the taxes against which they are issued, and which taxes against which said warrants are drawn shall be set apart and held for their payment".

April 20, 1905, the board of trustees unanimously (Grisko being present) passed the following resolution:

"Resolved, that the finance committee be and they are hereby instructed to confer with banking firms and ascertain what rates of interest will be charged and what arrangement can be made for cashing tax warrants issued on the 1905 appropriation".

On April 26, 1905,—Grisko also being present and voting—the board of trustees unanimously concurred in the following report of the finance committee:

"The Committee on finance, to whom was referred the resolution of Trustee Bills directing the finance committee to confer with banking firms to ascertain what rate of interest and what arrangements can be made for cashing warrants issued on 1905 appropriation, would respectfully report that we have conferred with various banks and find that William W. Weare & Co. agree to cash town warrants drawn against the 1905 appropriation, and charge therefor at the rate

judgment should not be reversed for the refusal to give said instruction.

The sidewalk in question was some distance above the ground. It was made of boards or plank laid cross-wise on stringers running parallel with the walk. Four witnesses for the plaintiff testified that many of the planks or boards of said walk had for months before that time been loose, rotten and some of them out of place. Plaintiff, in passing over said walk when it was dark, stepped on a board which either tipped up or broke and she fell, her legs going through the hole in the walk and astride a stringer. The accident occurred June 24, 1903. A carpenter called by defendant testified that for the defendant early in May, 1903, he repaired the sidewalk on the westerly side of Elston avenue, between Binzo street and Webster avenue; that he put in some new plank and nailed down some old ones that were loose; that he looked to see if there were any more loose planks and saw none. Two entries from the book of the ward superintendent were introduced by defendant, showing that repairs to the sidewalk were made near Binzo street May 7 and 8, 1903. We cannot, on the evidence in this record, say that the finding of the jury, implied by their verdict, that the defendant was guilty of the negligence averred in the declaration, is against the evidence.

Appellant further contends that the damages are excessive. The trial took place four years after the accident. Plaintiff when injured was about thirty-five years old, and up to that time her health had been good. She had lived with her husband and children and had a number of boarders. She had done the housework, including the washing. She was pregnant when injured. She was taken home in a police patrol wagon and was not able to leave her bed for fourteen months. When she got up she had to learn to walk, and up to the time of the trial had not been able to do any work. In the fall her seventh and eighth

ribs on the left side were fractured and the pleura and lung on that side injured. Four days after her injury she had a miscarriage, and afterwards her menses were irregular and she had a falling of the womb. Two or three months after her injury tuberculosis of the left lung was discovered and continued up to the time of the trial. Not long after her injury a hernia was discovered. In her fall one of her legs was injured, and afterwards varicose veins appeared in that part of the leg.

Whether the injury caused or brought on the tuberculosis and hernia was one of the controverted questions on the trial on which the testimony of the physicians called by the respective parties was conflicting. We do not think that on the evidence in the case the damages awarded by the jury can properly be held excessive.

Finding in the record no reversible error, the judgment of the Superior Court will be affirmed.

• *Affirmed.*

Annie Fuhry, Appellee, v. Chicago City Railway Company, Appellant.

Gen. No. 13,960.

1. **NEGLIGENCE**—*what establishes prima facie case.* Proof of status as a passenger and an injury resulting from a collision establishes negligence *prima facie* against the carrier and casts upon it the burden of showing that the collision occurred under such circumstances as to exclude its liability; *held*, that the evidence of the carrier as to the "slippery, greasy and muddy condition of the track" did not justify its exoneration from responsibility.

2. **EVIDENCE**—*how rate of speed may be shown.* The rate of speed at which a car was traveling at or about the time of an accident may be shown by the approximation of witnesses qualified from observation.

3. **EVIDENCE**—*what, of attending physician, competent.* The tes-

"appropriated and levied for the Corporate Expense Department" so many dollars to "W. W. Weare or bearer" or "The Lincoln Bank or bearer" (according also to the date of the warrant), with interest at $4\frac{1}{2}$ per cent. per annum from date. The warrants recited also that they were payable solely from the taxes of 1905 or 1906, as the case might be, when collected, and not otherwise; and that such taxes were pledged to their payment, etc. They were signed by Timothy J. Buckley as town clerk, and George Comerford as president.

On April 25, 1905, Grisko *as treasurer* had deposited with "William W. Weare & Co., Bankers", \$399.95, and on May 1, 1905, \$5,000, and these sums had been credited to "Louis Grisko, Treasurer", on the ledger of the Lincoln Bank. The second item at least was a check from the town collector. Grisko was given a bank pass-book in the usual form of the bank, which was entitled "William W. Weare & Co., Bankers, Morton Park, Ill., in account with Louis Grisko, Treas".

The first two items were:

Cr.

1905.

April 25, F.

\$ 399.95.

May 1, W.

5000.00.

In the ledger of the bank the corresponding entries also appear:

1905	fol.	Debit.	Credit.	Balance.
April 25,	207 dep.		399.95	399.95.
May 1,	211 dep.		5000.00	5399.95.

The next succeeding items on the Bank ledger, however, are debit entries.

The Bank by arrangement paid on presentation any general warrants issued by the Town of Cicero and brought to them for cashing. These general warrants were for the ordinary, usual expenses of the town, and were signed by the president and clerk of the

town, and stamped across the face payable at the Lincoln Bank.

During May, 1905, a check of the treasurer's for \$250 and twelve general warrants aggregating \$2,411.61 were presented (on different days) to the bank and paid by the cashier, who, as each item was paid, entered it as a debit entry on the "Grisko, Treas." ledger account, and made the "balance" carried out on the right of the page correspondingly less.

On May 13th this balance is shown as \$2,738.34. On May 15th Grisko deposited with Weare & Co. a check on the Chicago Bank in which he kept town funds for the full amount of these warrants—\$2,411.61—making up the balance again to the \$5,399.95 deposited, less the \$250 check, or \$5,149.95.

The cashier testifies that after that time, although the bank was continually paying general warrants presented to it, there were no charges of them made against the Grisko, Treas. account, but that they were held as cash slips in the cash drawer until a considerable sum had accumulated, and then some messenger from the bank would go down to the town hall and get a check from Buckley to be signed by Grisko and countersigned by Buckley for their amount. This course, the cashier said, was taken by Mr. Weare's instructions. When Atkinson took possession of the bank he directed that the same course should be continued.

It is of course evident from this that some arrangement not to deplete the treasurer's balance in the Weare and Lincoln Bank had been made for the benefit of somebody.

Mr. Grisko says that being no bookkeeper, he employed Mr. Buckley for \$250 in 1905 and \$500 annually in 1906 and 1907, to keep his books and transact all his business, and that he had no explanation of paying back the \$2,411.61 to the Cicero Bank by a check on the Chicago Bank to make, except that he depended entirely on Buckley and signed any check or did anything Buckley suggested without hesitation. As to

the subsequent withholding of any charge of the warrants cashed from the ledger account and their reimbursement by a check on a Chicago bank, although, as will be seen, large sums were piling up to the treasurer's credit at the Cicero Bank, Mr. Grisko has no further explanation than that he trusted Buckley to do his business, that he did not know what the "anticipation warrants" were or what they meant, or that he could draw any money on them. He testified, however, that he had looked over the report to May 20, 1907, and believed it to be all right, and that the preceding quarterly reports were made by Mr. Buckley under his direction and authority.

Buckley swears that Grisko employed him first in April, 1905 (which it is to be noted was a year after Grisko's first election), as his bookkeeper for a year "to keep his accounts as treasurer", and paid him \$200 for it, and that in 1906 Grisko subsequently employed him as his clerk for a year and paid him \$500 for his services, which terminated at the expiration of Grisko's tenure of office, May, 20, 1907, and that he, Buckley, kept a complete set of books showing all receipts, collections and disbursements of Grisko as treasurer, and that he made out from those books quarterly reports, which he presented to the board of trustees at Grisko's direction, but that when he drew checks on the Prairie State Bank or the Colonial Bank of Chicago to re-imburse the Weare or Lincoln Bank for warrants paid by them, he did so because he was directed to do so by Grisko, who had also told him that he had arranged with the Lincoln Bank to cash the ordinary town warrants at that bank; that he, Buckley, did not and does not know why Grisko kept the account increasing at the Lincoln Bank while paying warrants from the Chicago funds. He says, "I knew nothing of the treasurer's cash at all". Again he testifies, that he does not recall that he ever had one of the collector's checks given to the treasurer in his hands, or that he ever made out a deposit slip for them

or had anything to do with their deposit in the Chicago banks. He says: "I did not know there was a fund in the Lincoln Bank out of which the warrants could be paid"; that so far as he knew, except as Grisko told him of deposits in the bank, Grisko might have kept the money in his pocket; that Grisko gave him a check book on the Colonial Bank and told him to draw all checks from that check book for the warrants, and that he, Buckley, had personally or by advice or direction nothing to do with where Grisko deposited his money or on what bank he drew his checks, except to obey Grisko's directions.

Wherever the truth may lie in these conflicting statements of Grisko and Buckley in this testimony, and whatever the influence or agency of Buckley in the matter of the anticipation warrants, hereafter discussed, the controlling fact is that it was not Buckley but Grisko who was treasurer, who was responsible to the town and the people for the money and the places in which he deposited it and for whom the Metropolitan Surety Company became bondsman.

On June 10, 1906, there was the first deposit in the Lincoln Bank (or Wm. W. Weare & Co. bank, as it was then) of the "anticipation" warrants. On that date the anticipation warrant voted on April 26, 1905, for \$4,644.71, and a similar "anticipation" warrant voted on June 1, 1905, for \$3,900.60, were taken to the Bank by Grisko, to whom the warrants had been handed. He says that Buckley went with him, and that before going when Buckley handed him the warrants, he said, "We will go to the bank and make the deposit of these warrants". The abstract makes Grisko say that "after the first time Buckley did not tell me what to do with them because I knew", which is doubtless an inadvertent, but serious departure from the record.

The testimony of Grisko was that before these particular warrants were handed to him by Buckley, the remark above quoted, about going to the bank and

depositing them, was made. Then Grisko was asked: "And *after* he handed them to you what did he say?" Counsel objected. The court allowed him to answer. He began to answer thus, "Well, he didn't—" Counsel interrupting: "Q. Did he tell you what to do with them? A. He didn't say anything afterwards, because I knew where to deposit them". This is a very different statement from that which appears in the abstract.

The two warrants were handed by Grisko to the cashier, who thereupon placed in the pass bank book of "Grisko, Treas.," the third entry as follows:

June 10th, Warrants	\$8545.31,		
and made that day in the bank ledger in the account of Louis Grisko, treasurer, a credit entry, which with the preceding, before described, we show here:			
	Credit.	Balance.	
May 15, 224 Dep.	2411.61.	5149.95.	
June 10, 245 Tax Warrants	8545.31.	13695.26.	

It will be seen the amount of the tax warrants was added to the previous balance (conceded to be of cash) to make the credit balance at the close of banking hours on June 10th.

On July 10, 1905, the warrant voted on June 28, 1905, for \$2,198.51 was carried to the bank and handed to the cashier. A precisely similar entry was made of its amount in the pass book and the bank ledger, bringing up the balance in the latter to \$15,893.77. So on August 7th a warrant voted on July 26th. On October 16th two warrants, one voted on August 31st and one on September 29th, and on December 14th two warrants voted respectively on November 2nd and November 28th, were taken to the bank (which before these later dates had come into possession of Atkinson) and similar entries were made of their amounts in Grisko's bank book and in the ledger—the latter entries bringing up the balance of "Louis Grisko, Treas.," credited in that account to \$29,648.58.

February 24, 1906, there were taken to the Lincoln

Bank and credited to "Louis Grisko, Treasurer", in a lump sum of \$3,414.47, the "tax warrant issued in favor of Lincoln Bank upon the Water Works Bond Sinking Fund in the sum of \$11,500, for the purpose of paying interest on Water Works Bonds due February 4, 1906, said tax warrant to be issued on 1905 appropriation", ordered, as before noted, on February 1, 1906, and the anticipation tax warrant ordered on the same day, issued on the 1906 appropriation for \$2,264.47, "in favor of Lincoln Bank for the purpose of creating a fund from which to pay warrants ordered drawn", etc.

There was no distinction made in the treatment of these warrants, and it is to be noted that although thus depositing the water bond interest warrant in his account at the Lincoln Bank and receiving credit for its amount in his balance, which at the close of February 24, 1906, was \$33,063.05, Grisko paid in that quarter, as his report to the trustees from Jan. 1, 1906, to April 17, 1906, shows, \$1,125 of Water Bond coupons by check on the funds in a Chicago bank.

On April 12, 1906, anticipation warrants on the 1906 taxes voted March 1st and March 27th, on June 16th warrants voted May 1st and May 28th, on July 20th a warrant voted on July 2nd, on September 12th, warrants voted on July 30th and Sept. 5th, and on October 22nd a warrant voted on October 1st, were taken to the bank, handed to the cashier and their amounts entered like the previous ones in the bank book and the ledger. In the place of the word "warrants", however, there appears after the dates of the last three entries the letter "F", probably signifying the initial of the name of the cashier who took the deposit and made the entry. The total of credits shown in the pass book after the entry of Oct. 22nd was made was \$53,740.91, and the balance in the bank ledger was the same amount, less the one check of \$250, which had been drawn and paid on this account, or \$53,490.91, which was reported to the Town

Board, as we have seen, on June 3, 1907, as the "Balance in Lincoln Bank now defunct".

Some point is made in the arguments as to who took the various warrants to the bank. We do not consider it material, for they were taken in the name of and credited to Louis Grisko, Treasurer, but it may be noted that the cashier remembers Grisko and Buckley and a messenger from the town hall each bringing one or more, but says she never saw Grisko and Buckley at the bank together, while Grisko says Buckley went with him three times to make deposits, and that he went alone sometimes, and Buckley seems in his testimony to state or imply that he never was present when a deposit was made.

It is interesting to note what became of these warrants after they were left at the bank. "I put them in the safe and notified Mr. Atkinson that they were there, and the next morning he took them away and I never saw them again. I learned afterwards that he took them down town and borrowed money on them", is the cashier's testimony about this.

These warrants have been all paid by the town—some by Grisko while treasurer and some by his successor.

Evidence was introduced in this case also tending to show that the Lincoln Bank was so treated by Atkinson that it must have been insolvent shortly after he obtained control of it, but this transpired to the public only after the bankruptcy proceedings against him revealed it.

During the time when these tax appropriation warrants were issued and Grisko was thus carrying them to the Lincoln Bank and receiving credit in his account there as treasurer for their amount, there was either in the Prairie State National Bank or the Colonial Trust & Savings Bank of Chicago, to the credit of Grisko as treasurer funds belonging to the town of sums varying from \$119,582.08 on August 31, 1905, down to \$12,012.22 on October 1, 1906.

As to the money there was evidence tending to show, however, that the Treasurer had in his keeping "about twelve general funds and 350 different special assessment funds", all, however, kept together so far as his bank balances went, and that there was, therefore, no way of telling from a bank account of the treasurer whether the money in that account was or was not legally available for the payment of particular warrants.

From these facts, as we have said, the appellants deduce the proposition that the Treasurer and his official bondsman are not liable to the town for the amount of these tax appropriation warrants. We do not think their reasoning sound.

The warrants in question are not shown, in our opinion, to have been illegally issued, even if we should adopt the theory, which we regard as open to very serious question, that because of irregularity or even illegality in their issuance, their proceeds coming into the hands of the Treasurer as the money of the town, was not covered by the terms of the bond in question here. That question is academic, however, in this case.

The presumptions are in favor of the legality and validity of the warrants and the action of the trustees. The objection that they were not necessary to defray the ordinary expenses of the town is not proven by the showing of other funds in the treasurer's hands. The trustees must be held to be the proper judges of the necessity. To decide on this is a duty especially confided to them. What the necessary expenses or what the possible emergencies of the town were not shown in this record, nor even to what funds or for what purposes the money in the hands of the treasurer was legally and regularly available. The objection that the warrants were illegally issued because issued against a tax levy not then made, is not well taken, because this also is unproven. The objection proceeds on the theory that the extension of the

tax by the county clerk is the "levy". That is not the law. *Gage v. Bailey*, 102 Ill. 11. The appropriation bill of the proper authorities of the municipality is the "levy". In section 8 of the Act of March 25, 1869, to revise the charter of the Town of Cicero, it is expressly provided that "all amounts of moneys appropriated" by the Board of Trustees "shall be deemed a tax on the taxable property of said town". There is nothing in this record to show that appropriation of the amount of the "anticipation warrants" had not been made when they were ordered. Indeed there are indications, somewhat obscure in the absence of a complete record of the doings of the trustees and treasurer respecting them, that the appropriations did exist and that the very bills that the amount of the "anticipation warrants" was meant to pay were specified when the warrants were issued, and were thereafter paid on general warrants by the treasurer out of his Chicago funds, instead of out of the fund especially created to meet them.

However this may be, the presumption is in favor of the regularity and validity of these anticipation warrants when they were issued.

What then became of them? The position of the appellants that they were simply left with the Lincoln Bank as a bailee, and that it misappropriated them, is not consistent with the course adopted by the treasurer. They were expressly issued by the Board of Trustees, of which he was a member, for the purpose of *creating a fund* to pay certain general warrants recommended by the finance committee. They were issued payable to Weare or bearer or to the Lincoln Bank or bearer, after votes of the said Board of Trustees recommending that the proposals of Weare and of Lincoln Bank to "*cash*" said warrants at a certain rate of interest be accepted; they were handed to Grisko as treasurer; they were taken by him or by his authority and direction evidently to the bank; the amount of them was passed to his credit

on the ledger and entered on the bank pass-book which he held as treasurer; they were treated as the property of the bank by the proprietor; at first and evidently until some other arrangement was made, general warrants were paid from the fund thus created and charged against it, and finally the amount of their proceeds was reported every three months to the Board of Trustees by Grisko as treasurer through his authorized agent as "*cash*" in his hands. The appellants vigorously contend that these reports work no estoppel on them from denying that there was such cash on hand. It is not necessary to invoke any doctrine of estoppel to justify considering the proof sufficient that these warrants were not "bailed to" but "cashed by" the Lincoln Bank. These reports were at least admissions of the treasurer to that effect, made, as we believe, under all the circumstances that appear in this record, despite his own testimony, quite intelligently and consciously; but even these admissions were not necessary to the case against him, because it was proven by the facts without them. That the amounts entered were "paper credits", as the appellants say, is doubtless true; so are most of the transactions by which obligations are "cashed" precisely similar paper credits. A man takes to a bank bonds to be sold or notes to be discounted or drafts or bills of exchange to be negotiated or checks to be collected, and in the great majority of cases receives for them a bookkeeping credit in the books of the bank, evidenced besides by an entry on his pass-book. Frequently if not unusually too, these various transactions are respectively identified in the pass-book by the notation of the kind of obligation that is the subject of the deposit. Thus, "chks." may appear against one item, "bds." against another and "disc." against a third, meaning that the deposit was made in the first instance in checks, in the second in bonds, and in the third in notes. This is all a matter of common experience and knowledge, and is what happened in

the present case. The term "Warrants" after the entries in pass-book and ledger by no means shows that the items were not intended to be entered as cash, but were mere receipts for the instruments, as appellants contend. It only shows the source of the cash entry. So little importance indeed was attached to it that in the last three entries in the pass-book it was changed for the initial of the cashier, another customary note or quasi-identification of the transaction. The deposits in question produced a cash balance "in the hands" and control of the treasurer as really and efficiently as though the bank had paid Grisko in gold coin for the warrants and he had re-deposited the coin to his credit.

It is said that the town was guilty of *laches* which should prevent its recovery, because it took no steps to stop payment of the warrants after the failure of the bank. Such attempt would have been futile. The obligations were valid, as we have said, and in the hands of holders for consideration. There is nothing in this point.

But it is said that the bank was insolvent after a large part of this balance credited to Grisko had accrued and before the Metropolitan Surety Company became the surety on his bond April 16, 1906, and that therefore the default, if there was one, on the part of Grisko as treasurer, was, so far as that amount was concerned, before the bond sued on was executed, and that the appellant Surety Company is not liable therefor. This defense cannot be sustained. It is true that as a banking house—a separate business—which alone the cashier, Miss Flagler, could and did testify about, and which alone Mr. Jennison, the expert accountant called, seemed to testify about, the Lincoln Bank seems shown by the testimony to have been in a bad way before April, 1906; and it also appears by the testimony of Mr. Sessinghaus that the estate in bankruptcy of William J. Atkinson, of whose assets the "Lincoln Bank was a part", as the accountant,

Mr. Jennison, says, will pay but very little, if anything, to creditors; but all this falls short of actual proof that William J. Atkinson, *all* of whose assets were liable for every cent of the liabilities of this privately owned "banking house", was insolvent before April 16, 1906, or could not have been made to respond at that date for the deposits of the Lincoln Bank. It is quite conceivable that "plunging" and "speculation" in other schemes, into which he put the funds of his "banking business", brought him to irredeemable bankruptcy between April 16, 1906, and December 17, 1906.

But aside from this and on the assumption that both the "banking house" and its owner were proved hopelessly insolvent before April 16, 1906, the Metropolitan Surety Company could take no benefit therefrom. Even if, as claimed by appellants, the reports of the treasurer to the Board of Trustees worked no estoppel against his showing that what he charged himself with as "cash" was in fact merely receipts for negotiable paper of the town, yet when that proposition is rejected on other grounds, and it is held that the face amounts of the warrants after they were left with the bank were "cash" in his hands, the reports estop him and his surety from denying that the cash was in his hands and control (however insolvent his bankers or other debtors might be) when he so reported it. This proposition is supported by explicit decisions of the Supreme Court of Illinois, such as *Morley v. Town of Metamora*, 78 Ill. 394; *Chicago v. Gage*, 95 Ill. 593; *Cawley v. People*, 95 Ill. 249; *Longan v. Taylor*, 130 Ill. 412; and *Cowden v. Trustees of Schools*, 235 Ill. 604.

The principle of these cases governs in this case on this point. It is consistent with justice and right reason. The distinction which counsel makes between these cases and the one at bar, in that in them there were conscious defalcations and concealment by false reports, while in the present case there was neither,

operates, as we think, rather against than for their contention.

In the present case there could have been no concealment from the Surety Company when it signed the bond in question. It could have seen the reports and investigated their truth. It could have required information as to where every dollar reported was to be accounted for, and on the assumption of Grisko's honesty as insisted on, could have obtained it. Then, it could have investigated (better probably, because with more facilities—certainly as well—than any citizen or officer of Cicero) the condition of the Lincoln Bank. It was heedless and negligent in not doing so. The more ignorant or illiterate Grisko was, the greater was its heedlessness and negligence. They do not work to the damage and disadvantage of the town, which relied on its bond, but to its own.

Appellants say that judgment should not have gone against the defendants, because no demand was made upon Grisko before bringing the suit, and *Dreyer v. The People*, 176 Ill. 590, is cited to show the necessity of such demand. That on a criminal indictment for the statutory offense of not paying over money to a successor in office, a man cannot be sent to the penitentiary without proof that the said successor demanded such payment, is a very different proposition from the one urged here—that in a civil case a man who has not turned over such money and has practically admitted that he had no money to turn over, cannot with his surety be sued on a bond which binds him to account for and pay over the same pursuant to law, and faithfully perform the duties of his office. No demand was necessary. The suit is a sufficient demand.

Nor is the position tenable that the town warrants for \$6,858.84 paid by the Lincoln Bank before its failure should be set off against the liability of the appellants on the bond sued on here. William J. Atkinson, under the name of The Lincoln Bank, or other-

wise, is not a party here. There is no proof in this record that the choice of a bank was dictated to or forced on Grisko. The warrants were to be cashed by the Lincoln Bank, but their proceeds might have been deposited by the treasurer wherever he wished. He and his bondsmen are responsible for all the money which his accounts show in his hands and which he has not turned over.

We think that interest was properly allowed on the amount found due. The doubt, if there be one on this point, arises from the fact that no demand was made on Grisko before bringing this suit, but, as we have said, he practically declared by his last report and subsequent action that he could not pay anything beyond the \$4,328.14 which he did turn over. The last report, accepted without dispute by the Board of Trustees, liquidated and settled the amount due. We think that the principle of *Cassady v. Trustees*, 105 Ill. 560, and *Stern v. The People*, 102 Ill. 540, requires the allowance of interest.

The judgment of the Municipal Court is therefore affirmed.

Affirmed.

Town of Cicero, Appellee, v. Joseph Hall et al., Appellants.

Gen. No. 14,458.

1. *BONDS—when liability as at common law enforced.* If a bond initially given as a statutory bond does not comply with the statute, it is none the less valid and will be enforced as a common law obligation.

2. *BONDS—when town collector's bond substantially in compliance with statute.* The town collector's bond in question in this case held substantially in accord with the statute providing therefor.

3. *BONDS—when surety liable upon town collector's.* Held, that

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under the terms of the bond of the town collector in question in this case, treated either as a statutory or as a common law obligation, that the sureties upon such bond were liable for the failure of the town collector to account for moneys reported by him as in his possession where he had deposited the same in a bank of his own choosing.

Action in debt. Appeal from the Municipal Court of Chicago; the Hon. JOHN H. HUME, Judge, presiding. Heard in this court at the March term, 1908. Affirmed. Opinion filed November 12, 1908.

Statement by the Court. This is an appeal from a judgment of the Municipal Court of Chicago in favor of the Town of Cicero and against Joseph Hall and the Metropolitan Surety Company in a case of the first class in debt. The judgment was in the penal sum of a bond sued on, the damages being assessed at \$6,329.96. The judgment was by the consideration of the court, sitting without a jury. After finding the issues for the plaintiff the court overruled a motion for a new trial and a motion in arrest of judgment, and gave judgment as above stated. From this judgment the defendants have appealed to this court and have assigned various errors. Their contention in argument is confined to the proposition that under the undisputed facts, the finding of the court was erroneous in law.

The facts out of which the suit grew and which appear in the record are these:

The defendant, Joseph Hall, was on April 4, 1906, elected Collector of the Town of Cicero in Cook county, Illinois, for a period of one year. He entered on his duties April 17, 1906, at which time he presented and the Board of Trustees of the Town of Cicero accepted and approved a bond in the penal sum of \$20,000, with himself as principal and The Metropolitan Surety Company of New York as surety thereon, conditioned as follows:

"The condition of this obligation is such, that whereas, the above bounden Joseph Hall was on the fourth day of April, A. D. 1906, duly elected to the

office of Collector of said Town of Cicero, in the County of Cook aforesaid, for the period of one year.

Now therefore, if the said Joseph Hall shall faithfully account for all moneys that may come into his hands as such Collector, and pay over the same pursuant to the provisions of law or the order or resolution of the Board of Trustees of the Town of Cicero, and shall faithfully perform the duties of his office to the best of his skill and ability, then this obligation to be void; otherwise to remain in full force and effect''.

Joseph Hall continued to perform the duties of Collector of the Town of Cicero until April 29, 1907, at which date his successor in office, Erskine Hart, assumed them.

Just prior to the relinquishment of his office Mr. Hall made a report to the Board of Trustees, which was thereafter filed in the Town Clerk's office, showing accurately, as is conceded, his receipts and disbursements during his entire term of office.

This report first showed the collection of \$60,908.77 on general taxes, the charge against it of \$1,218.77, or two per cent., as commission for collecting, and the payment to the county, town, sanitary and township treasurers of the balance of \$59,690.60. Then followed a separate report or section of the report, entitled Miscellaneous Collections to April 30, 1907, which gave items of receipts from April 18, 1906, to April 30, 1907, of water rates, saloon and pool table licenses, dog licenses, undertakers', peddlers', junk dealers', sewer builders', express men's, house movers' and milk licenses, miscellaneous collections and building, sewer and water permits and the disposition of them.

The summary or recapitulation with which this section of the report concludes is as follows:

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"Summary.

Total collections,	53704.29
Total commissions,	1074.09
Shortage Failure Lincoln Bank,	6102.07
To Louis Grisko, Treasurer,	46528.13
	<hr/>
	53704.29 53704.29."

After testifying to the accuracy of this report Mr. Hall, who was called in this suit as a witness for the plaintiff, testified that he did not turn over to the Treasurer of the Town of Cicero the \$6,102.07 mentioned, but deposited it with the Lincoln Bank, which failed. "That is the reason", he said, "I failed to turn it over".

On account of this failure, the present suit was brought and a declaration in debt on the bond filed. The declaration assigned as a breach of the bond that Hall did not faithfully account for all moneys that came into his hands as collector and pay over the same pursuant to the provisions of law to the Supervisor (who by law is the Treasurer) of the plaintiff and did not faithfully perform the duties of his office to the best of his skill and ability.

The defendants filed a plea of *nil debet*, which was successfully demurred to, a plea of *non est factum*, on which issue was joined by a *similiter*, and the two other pleas, which were traversed with a tender of issue.

The first of these pleas was to the effect that the said Hall paid over all the moneys that came into his hands as said Collector, pursuant to the provisions of law, by the order or resolution of the Board of Trustees of the Town of Cicero, to the Lincoln Bank of Morton Park, Illinois, or to other person or persons designated by said Board, and so did faithfully account for all moneys coming into his hands as Collector. The second asserts that Joseph Hall has at all times faithfully accounted for all moneys that came into his hands as Collector of the Town of Cicero,

and paid over the same pursuant to the provisions of law or the order or the resolution of the Board of Trustees of the Town of Cicero, and faithfully performed the duties of his office to the best of his skill and ability, according to the true intent and meaning of said writing obligatory.

RUNNELLS, BURRY & JOHNSTONE, for appellant.

JOHN J. SHERLOCK and HIRAM T. GILBERT, for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

We have just filed an opinion in the cause of the Town of Cicero v. Louis Grisko et al., *ante* p. 564, in which the failure of the so-called Lincoln Bank at Morton Park, and its effect on the funds of the town in the hands of its Treasurer were involved. That opinion shows to some extent the state of things which brought about the failure. The suit at bar is one of its effects, and the defendants unfortunate victims of it. But we can see no valid defense to the claim of the town shown in this record.

One line of argument of the appellant company which was surety on the bond sued on, as shown by a proposition of law tendered by it to the court and refused, is (a) that the bond was not in substance, even the same as the bond required by statute, and (b) that the bond given being substantially different from the statutory bond, the surety is not liable "for money which the collector in good faith and without negligence" deposited in a bank, and lost by the failure of that bank.

The second clause of the proposition is plainly a *non-sequitur*. If the bond is not in accordance with the statute it may still be valid as a common law bond, and the question of the liability of the surety in the case is to be determined not arbitrarily by the

fact of the difference, but by the terms of the bond given.

Another line of argument of the appellants, as shown by another proposition of law rejected by the court, is that in the present case (a) the covenant "to pay over money", found in the bond sued on, is merged in the covenant faithfully to perform the collector's duties, and (b) that if the officer otherwise faithfully performed his duties and "honestly and in good faith" deposited money in a bank, which money was lost by the failure of said bank, the surety is not liable.

The connection of these two propositions also involves a *non-sequitur*, for the question whether the collector has faithfully performed his duties when he has deposited the money in a bank of his own choosing, depends on what the law makes his duty with reference to that money.

Neither proposition as offered was sound, and they were properly refused.

Nor is the basis on which either argument rests sound in its premises. We do not think that the bond given differed substantially from the bond prescribed by statute, nor that the covenant "to pay over money" in this case was merged in the covenant "to faithfully perform".

The bond as given appears in the statement prefixed hereto. Its condition is that:

"Joseph Hall shall faithfully account for all moneys that may come into his hands as such collector, and pay over the same, pursuant to the provisions of law or the order or resolution of the Board of Trustees of the Town of Cicero, and shall faithfully perform the duties of his office to the best of his skill and ability".

The condition prescribed for the collector's bond by section 6 of the charter of the Town of Cicero (Private Laws of 1869, vol. 3, p. 668) is: "That he will well and truly pay over and account for all

moneys that may come into his hands as collector to the party or parties entitled thereto, and that he will faithfully discharge the duties of his said office”.

We do not think there is any substantial difference in these conditions. To pay over money “to the party entitled thereto” is to pay it over “pursuant to the provisions of law”, and *vice versa*. We do not think the addition of the words “or the order or resolution of the Board of Trustees of the Town of Cicero” substantially changes the required condition. It is not to be presumed that the Trustees would order the money turned over to parties not entitled by law to receive it.

Certainly the addition of the words “to the best of his skill and ability” do not add or subtract anything from the words “faithfully perform the duties of his office”. We know of no case where their conventional use has been held to excuse default resulting from ignorance or credulity not excusable or justifiable in a public officer.

But if the bonds are different, and the bond given merely a common law and not a statutory bond, there is still no doubt that to escape liability in this case, where money received by Hall as collector was not paid over to any one but an insolvent bank selected by himself—which bank had no claim to it—the surety must show that the collector has, notwithstanding such failure, complied with the conditions of the bond he gave. It is plain he did not. He neither faithfully “paid over” the money that came into his hands pursuant to the provisions of law or the order or resolution of the Board of Trustees of the Town of Cicero, nor did he “faithfully perform the duties of his office to the best of his skill and ability”.

The obligations and duties of a town collector are very different from those of the officers or employes and agents mentioned in the cases cited by appellants.

In C., B. & Q. R. R. Co. v. Bartlett, 120 Ill. 603, for

example, the principal in the bond was a paymaster of a railroad, from whom the money was stolen, and as the headnote puts it, the court held that "where the company required such agent to keep the moneys in a room not properly protected against the entry of thieves or burglars * * * and a large sum was stolen from the safe during the temporary absence of such agent, without any neglect of duty or want of care on his part, the agent could not be held liable on his bond conditioned that he would account for all moneys coming to his hands".

The difference between such a case and the present one needs no elaboration. In this case the town did not prescribe the place of deposit to the Collector. It did not oblige him to keep the money anywhere. It presumably invited him to turn it over to the treasurer as nearly as possible as he collected it.

That a collector for a municipality giving a bond "to faithfully perform the duties of his office", even were there nothing else conditioned in it, should be excused from paying over money which he had collected for the municipality by showing that he, of his own volition, had loaned it to an insolvent speculator, whether such speculator did business under the name of a bank or otherwise, would be a very dangerous doctrine to hold.

But that is what the defense amounts to in this case. The Lincoln Bank was William J. Atkinson. The "deposit" in the Lincoln Bank is what all general deposits in a bank are—a loan on demand to the "Bank"—in this case William J. Atkinson. He was insolvent and could not pay it back. Mr. Hall may be morally guiltless, but he is legally responsible for the money. His bondsman is responsible with him. It would be judicious for bonding companies to keep closer watch of the investments and deposits of public money.

The questions raised in this case concerning the necessity for demand and of the allowance of interest

Olcese v. Val Blatz Brewing Co., 144 App. 597.

do not differ from those discussed in *Cicero v. Grisko et al.*, before referred to.

We think the judgment of the Municipal Court is correct and should be affirmed, and it is so ordered.

Affirmed.

**Louis Olcese, Appellee, v. Val Blatz Brewing Company,
Appellant.**

Gen. No. 13,977.

1. **LANDLORD AND TENANT**—*liability for rent of assignee of latter.* While at common law and under the decisions of the English courts, an assignee in virtue of a mortgage would be liable to pay rent to the lessor in the assigned lease, regardless of the fact of actual entry having been made into the demised premises, or possession thereof taken, yet that doctrine has been somewhat relaxed in this country, for while the mortgagee is out of possession the mortgagor for every substantial purpose is regarded as the real owner, and the mortgagee not treated as a real assignee. However, after entry the possession thus obtained by the mortgagee subjects him to that privity of estate with the landlord which imposes upon him the obligation to pay rent in accord with the terms of the lease assigned by the covenants of the mortgage.

2. **INSTRUCTIONS**—*approved form of, as to when chattel mortgage operates as assignment of lease.* The following form of instruction upon this subject approved:

"The jury are instructed that if they believe from the evidence that the plaintiff, Louis Olcese, made a lease of the premises to Edward Kelly; and that Edward Kelly executed and delivered a chattel mortgage, which by its terms included the lease of the premises in question to Val Blatz Brewing Company, and that thereafter Val Blatz Brewing Company paid rent of the premises in accordance with the terms of the lease of the premises to said Edward Kelly, then such chattel mortgage operated as an assignment of the lease to the Val Blatz Brewing Company and the Val Blatz Brewing Company became liable for the payment of rent in accordance with the terms of the lease."

Trespass on the case. Appeal from the County Court of Cook county; the Hon. DAVID T. SMILEY, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed November 12, 1908.

Statement by the Court. Plaintiff in this action seeks to recover rent of the premises 7 Dearborn street, Chicago, from defendant as the assignee of Edward Kelly. The lease was in writing, under seal, and contained a covenant against assignment without the consent of the landlord. The term commenced November 4, 1902, and was to end April 30, 1908. On March 28, 1905, Kelly, being in arrears of rent and indebted to defendant, made a chattel mortgage to defendant conveying a saloon license, certain personal property, consisting of saloon fixtures in the leased premises, and also by the conditions of the chattel mortgage assigned the lease to defendant as security for its debt. Kelly quit the premises about April 20, 1905, and procured from plaintiff a consent in writing to sublet the premises or transfer the lease to any "respectable party". After Kelly went out of possession, the lease with the consent to sublet or assign was given to and remained with defendant, and defendant paid the past-due rent, amounting to \$288.33, and a further payment, on account of rent subsequently accruing, of \$266.67. The receipts run to Kelly, but were given to defendant, who retained them in its possession. One Merslak conducted the saloon business in his own name from the time Kelly moved out until defendant foreclosed the Kelly chattel mortgage. The rent so paid, defendant contends, was received by it from Kelly and Merslak, and that in paying the same to plaintiff they were acting as agents only. The premises were subsequently closed and defendant took steps to foreclose the Kelly mortgage, and on June 1, 1905, removed the mortgaged saloon property from the demised premises. Plaintiff re-rented the premises July 14, 1905, and claims rent for the months of April, May, June and one-half of July, 1905, amounting to \$700, for which he recovered judgment in the County Court. At the close of plaintiff's case, and again at the close of all the proofs, defendant moved the court to instruct a verdict in its

favor, both of which motions were denied and exceptions duly preserved. Motions for a new trial and in arrest of judgment having been made and denied, defendant duly excepted and prayed an appeal to this court, which was allowed and perfected.

WINSTON, PAYNE, STRAWN & SHAW, for appellant;
EDWARD W. EVERETT and GARRARD B. WINSTON, of
counsel.

ILES & MARTIN, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

It was assigned for error and argued that there is a fatal variance between the averments of the declaration and the proof, in the rulings of the court in the admission and rejection of evidence, and in the giving and refusal of certain instructions to the jury upon the law.

We think the jury were justified from the evidence in concluding that the defendant took actual possession of the premises under the assignment of the lease to it in the Kelly chattel mortgage, and that such possession was taken through Merslak, who held possession for the defendant until the physical foreclosure of the Kelly chattel mortgage occurred June 1, 1905. The fact that when Kelly made the chattel mortgage he delivered with it the lease of the premises, and that defendant in fact paid directly several months rent to plaintiff, taking and retaining the receipts therefor, and also took and retained the written consent of plaintiff to the assignment of the lease, and the further fact that Merslak paid money from the saloon business to defendant during the time he had charge of that business, are all inconsistent with the claim by defendant that it acted in all these matters merely as the agent of Kelly and Merslak. The lease, while it remained in the possession of defendant, was not

assigned, except as the covenant in the chattel mortgage worked an assignment of it to defendant. There was no other assignment made by Kelly to defendant and no pretense of an assignment to Merslak. Neither Kelly nor Merslak were produced as witnesses by defendant to explain, if explanation were possible, their relations to defendant in an effort to show that they were contrary or different from that arising from the admitted dealings of defendant with plaintiff and the leased premises. There is nothing in the proofs from which an inference should be indulged that either Kelly or Merslak were hostile to defendant. The matters alleged by defendant were in the nature of defenses to plaintiff's claim, the burden of sustaining which rested upon defendant. The admission of Meyer that defendant was good for the rent was made at a time when its liability therefor was asserted and his admission must be construed with that fact in mind. He made it as the representative of defendant in a matter impliedly entrusted to him as its manager, in the usual course of defendant's business.

Whether the assignment of the lease under the conditions of the Kelly chattel mortgage followed by the continued possession of the lease, otherwise unassigned, was sufficient to fasten upon defendant liability to pay the rent reserved by the lease without the taking of possession of the demised premises, is not of the essence of the right of plaintiff to maintain this judgment, in view of the fact that defendant did take possession through Merslak and did pay rent in accordance with the terms of the lease. While at common law and under the decisions of the English courts, an assignee in virtue of a mortgage would be liable to pay rent to the lessor in the assigned lease, regardless of the fact of actual entry having been made into the demised premises, or possession thereof taken, yet that doctrine has been somewhat relaxed in this country, for while the mortgagee is out of possession the mortgagor for every substantial purpose

is regarded as the real owner, and the mortgagee not treated as a real assignee. However, after entry the possession thus obtained by the mortgagee subjects him to that privity of estate with the landlord which imposes upon him the obligation to pay rent in accord with the terms of the lease assigned by the covenants of the mortgage.

There are no decisions in this state announcing a contrary doctrine. *Babcock v. Scoville*, 56 Ill. 461, was not the case of assignment by mortgage, but an assignment direct of the lease itself. The question there was the liability of the assignees, who had not taken possession of the leased premises, for the rent. It was contended on the part of the assignees that they were not liable and could not be held liable, because they had not gone into possession. On the part of the lessor it was contended that the assignment being of the whole estate under the lease, nothing being reserved by the assignment to the lessee, it did not require possession to create a privity of estate between the lessor and the assignee; and the court say in the *Babcock* case, *supra*: "With this much of authority in support of the doctrine, laying out of view the case of an assignee by operation of law, so far as has come under our examination we do not find it elsewhere laid down in any reported case, or by any legal writer of approved authority, that, in case of an absolute assignee in fact of a term of years, an entry by the assignee is necessary in order to subject him to a liability for the rent, but the whole tenor of authority is to the contrary". However, the exact principle enunciated in the *Babcock* case is not precisely the same as the one now before us, because we hold that defendant both entered into possession and attorned by the payment of rent under the terms of the assigned lease—elements entirely lacking in the *Babcock* case. The only significance arising here is in relation to its application to the first instruction

and the error assigned to its giving, which we will hereafter refer to.

We are unable to discover any substantial variance between the averments of the declaration and the material evidence adduced in support of them. Some of the averments concern the assignment of the lease in virtue of the terms of the Kelly chattel mortgage to defendant and the entry into possession by the defendant, and that the rent claimed was due and unpaid. The averments that the making of the lease by plaintiff to Kelly, its assignment by means of the chattel mortgage given by Kelly to defendant, the entry into possession of the leased premises by defendant through Merslak, attorning to plaintiff by payment of rent, and that the amount recovered was rent due under the terms of the assigned lease, find ample support in the evidence. An examination of the evidence rejected by the trial court discloses that it was in the nature of hearsay testimony, conclusions of the witnesses interrogated and of matters immaterial to the issues, such as whether or not the leasehold interest conveyed by the chattel mortgage was sold at the time of the foreclosure sale of the saloon fixtures. The mortgage conveying the leasehold interest with possession in and payment of rent by defendant, all of which occurred some time prior to the foreclosure sale, was a sufficient appropriation of the lease, and as to it a foreclosure of the mortgage. The usual covenant to sell with or without notice, at public or private sale, being in this mortgage what was sold after the seizure of the saloon fixtures June 1, 1905, did not affect or change what had already been done about the lease.

It is ably argued with much apparent confidence that the giving of the following instruction was reversible error:

"The jury are instructed that if they believe from the evidence that the plaintiff, Louis Olcese, made a lease of the premises to Edward Kelly, and that Ed-

ward Kelly executed and delivered a chattel mortgage, which by its terms included the lease of the premises in question to Val. Blatz Brewing Company, and that thereafter Val. Blatz Brewing Company paid rent of the premises in accordance with the terms of the lease of the premises to said Edward Kelly, then such chattel mortgage operated as an assignment of the lease to the Val. Blatz Brewing Company and the Val. Blatz Brewing Company became liable for the payment of rent in accordance with the terms of the lease”.

This instruction did not necessarily exclude from the jury the consideration of the fact that possession by defendant under the assignment in the chattel mortgage of the lease was an essential element to charge defendant with liability for rent. The payment of rent by defendant was an attornment to plaintiff as landlord, paid, at least inferentially, while defendant was in possession; still, should it be conceded that this instruction did not contain the element of possession at all, it is clear that nothing was stated in it to the contrary, so that any omission of this character was amply supplied by instructions given at the request of defendant, in which the jury were informed that if they found from the evidence that the defendant did not accept the assignment of the lease and did not become the tenant of plaintiff, there could be no recovery. Furthermore, all the law applicable to the several phases of the defense which the defendant requested by instructions were given to the jury, with the exception of one, in which the claim of agency in the payment of rent by defendant was asked to be submitted to the jury, and in which it was laid down that if the rent was paid by defendant as agent there could be no recovery. There was no evidence to which such instruction had any application, and it was therefore properly refused. The instructions must be taken and read as a whole, and in so doing it appears that the jury were fairly and sufficiently in-

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structed on the law of the case and upon every point requested favorable to the defense.

Upon the whole record substantial justice appears to have been done upon the merits, and as said in Lebanon Coal & Machine Ass'n v. Zerwick, 77 Ill. App. 486: "Where upon the whole case substantial justice has been done, erroneous instructions will not reverse, and where one or more instructions are erroneous and others state the law correctly and the verdict returned is strongly supported by the evidence and clearly right and just, the presumption usually prevails that upon the whole the jury was not misled as to the law".

The most that can be said about the first instruction is that it did not go quite far enough; but even so, what it lacked was supplied in the instructions given at the instance of defendant.

Finding no error in this record warranting a reversal of the judgment of the County Court, it is consequently affirmed.

Affirmed.

George H. Wilson, Appellee, v. Chicago City Railway Company, Appellant.

Gen. No. 13,983.

1. PASSENGER AND CARRIER—*what essential to establish prima facie case of negligence.* The allegations of negligence being shown, a *prima facie* case in favor of the plaintiff is established by evidence tending to show that the defendant was the owner of and operating the cars in collision, that the plaintiff was a passenger upon one of the colliding cars, that the cars came into collision while he was in the exercise of due care for his own safety, and that he was injured as a result of such collision. The fact that the plaintiff at the trial attempted to prove specific acts of negligence is not material as affecting the *prima facie* case thus made out; such *prima facie* case being made out, the burden is shifted to the defendant to exculpate or excuse itself from the liability so cast

upon it by the evidence of the plaintiff that the collision of its cars occurred from negligence imputable to it from that fact.

2. *VERDICT—when not excessive.* A verdict of \$2,500 in an action for personal injuries is not excessive where it appears that as a result of the accident the plaintiff suffered a severe injury to the drum of his ear, that the impairment of his hearing was permanent, and that he suffered pain in consequence of his injuries.

3. *DAMAGES—when medical expenses may properly be allowed.* Evidence of payment or assumption of the obligation for the payment of medical services is not essential to the allowance thereof as damages, if the evidence shows that the liability has in fact been incurred.

4. *EVIDENCE—what testimony attending physician may give.* An attending physician may properly be permitted to testify concerning his knowledge, acquired as such attending physician, of the plaintiff's suffering pain from an injury made the basis of the action.

5. *EVIDENCE—what test competent in proof of injury.* A watch ticking test made by an attending physician to determine the hearing of the plaintiff held competent.

Trespass on the case. Appeal from the Superior Court of Cook county; the Hon. ARTHUR H. FROST, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed November 12, 1908.

Statement by the Court. This is an action of trespass on the case for the recovery of damages for personal injuries suffered by plaintiff as the result of a collision between two cars of the defendant, upon the east-bound of which he was a passenger.

The declaration consists of one count, and charges negligence generally in these words: that defendant "so negligently, carelessly and unsafely managed and operated the said car upon which the plaintiff was riding as aforesaid, and said other car, that said cars through such negligence, careless and unsafe operation and management collided and came together with great force and violence at the intersection of said Thirty-fifth and Halsted streets".

Plaintiff on the morning of June 10, 1903, left his home, 3810 Honore street, Chicago, to go to the place of his employment at Schlesinger & Mayers, at the

corner of Madison and State streets in the business district of Chicago, and in so doing took a car of defendant running east on Thirty-fifth street. Defendant also operates a line of cars north and south on Halsted street, which intersects the line upon which plaintiff was riding as a passenger at Thirty-fifth street. The Halsted street car had the right of way across Thirty-fifth street, making it incumbent upon the motormen in charge of cars on Thirty-fifth street when approaching Halsted street to stop their cars so as to accord that right and avoid the risk of colliding with a passing Halsted street car. The motorman in charge of the car upon which plaintiff was a passenger failed to arrest the progress of his car at the point mentioned, such failure resulting in a collision with a Halsted street car proceeding south across the Thirty-fifth street tracks. The excuse made by defendant for the collision is the greasiness of the track, occasioned by the sprinkling of water upon the street over which the tracks were laid, and that notwithstanding the motorman exerted himself to the utmost and made application of all the appliances at hand in an endeavor to stop the car before reaching the west crossing of Halsted street, all of such appliances on the car being in good order, and the fact that he reversed the wheels of the car, still the car slipped along the track and the collision resulted without the fault of the motorman and in spite of all his efforts to avoid the impact.

The force of the colliding of the cars was such as to throw plaintiff from his seat, striking his mouth against the rail on the top of the rear dashboard; his body then rebounded backwards, striking the back of his head and neck on the sill of a window in the partition back of the seat on which he was sitting at the moment of the contact between the cars. As a consequence of the collision plaintiff had one of his teeth knocked out and three others loosened, all of which he subsequently lost; his lip and gum were cut; the drum

of his ear was injured, from which he suffered great pain and an impairment of his ability to hear.

Defendant pleaded the general issue and the cause proceeded to trial before the court with a jury and resulted in a verdict and judgment for \$2,500. After the court overruled defendant's motion for a new trial and in arrest of judgment, to which the usual exceptions were preserved, defendant prayed and was allowed this appeal, and the record is before us for review.

WILLIAM J. HYNES, JOHN E. KEHOE and WATSON J. FERRY, for appellant.

GANN & PEAKS and CHARLES G. NEELY, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

The errors assigned and argued as constituting grounds for reversal of the judgment of the trial court are: that the verdict is not justified by the evidence, but it is contrary to its manifest weight; that the trial court excluded proper and admitted improper evidence; refused to submit to the jury certain instructions tendered by defendant, and gave certain other instructions at the instance of plaintiff, and that the damages are excessive.

The insistence of defendant that the plaintiff did not prove acts of defendant which were negligent and through which negligent acts the collision between the defendant's cars was brought about, with the resulting injury to plaintiff, seems to be occasioned by a misconception of that degree of proof made necessary by the pleadings. Plaintiff's declaration charges defendant with negligence generally as bringing about the collision between its cars at Halsted and Thirty-fifth streets. Had the allegation been of specific acts of negligence, then plaintiff would have been restricted to his right of recovery to proofs sufficient

to sustain such specific acts. Under the pleadings found in the record, all the law required plaintiff to prove by competent evidence, in order to make a *prima facie* case entitling him to recover in the absence of countervailing proof, was that defendant was the owner of and operating the cars in collision; that plaintiff was a passenger upon the colliding Thirty-fifth street car; that the cars came into collision while he was in the exercise of due care for his own safety; and that he was injured as a result of such collision.

It is true that plaintiff attempted upon the trial to prove specific acts of negligence, such as the failure of the motorman to exercise diligence in the management of the car, and that the motorman of the Halsted street car was negligent in not using due diligence to avoid the collision. Even admitting that proof of specific acts of negligence did not appear from the evidence at the time plaintiff closed his main case, yet, as it contained the proof incumbent upon him to make under the averments of his declaration to entitle him to recover, he had satisfied all legal requirements. The burden was thereupon shifted to defendant to exculpate or excuse itself from the liability so cast upon it by the evidence of plaintiff, that the collision of its cars occurred from negligence imputable to it from that fact. Much of the argument of defendant is without force, in the light of our ruling as to the limitations of plaintiff's proof. It is, however, urged as a complete defense that the accident was without the fault of defendant because all was done that possibly could be done with the approved agencies at hand to prevent it. The failure of the motorman sufficiently to control the movements of the car so as to stop it before the collision, is attributed to the greasiness of the track brought about by the sprinkling of the street with water; that the day was bright, the air clear and the sun shining, and that the effect of the sun's rays was to evaporate some of the water and make a greasy, muddy condition upon the tracks, which prevented the

motorman from observing their condition in time to stop the car. There was testimony tending to show that the motorman made no attempt to arrest the speed of his car so as to stop it before crossing Halsted street, and furthermore there is an entire absence of any evidence of a sprinkling cart or wagon being in the neighborhood of Thirty-fifth street west of Halsted street the morning before the accident. On the contrary there was some evidence to the effect that the street car tracks at that time and place were dry. The jury may have believed from this evidence that the claim that the street had been sprinkled and the car track was greasy was a fabrication. There is also some evidence tending to demonstrate that the motorman of the Halsted street car might have stopped his car in the exercise of due care in time to have avoided the collision, and that his not so doing was negligence. The jury may have regarded the testimony of the numerous witnesses of defendant as insufficient to relieve it from the liability for negligence imputable to it from plaintiff's proofs. The jury saw the witnesses—a privilege denied us—and from their manner of testifying, their appearance upon the witness stand, their impartiality or bias, whichever was apparent, were better able than we to say which of them was the most worthy of belief; and as plaintiff made all the proof necessary under the averments of his declaration to entitle him to prevail, we cannot say that the verdict is not justified by the evidence or that it is contrary to its manifest weight. On the contrary, we do not perceive how the jury could have decided otherwise than they did.

The injuries of plaintiff are deemed trifling by defendant, and for that reason it regards the damages awarded as excessive. It is quite true that plaintiff immediately after the accident did not regard himself as seriously injured, for he at once acted the part of a good Samaritan and helped carry an injured woman to the office of a medical practitioner. After doing this

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humane act he proceeded to his employment, and there for the first time discovered blood flowing from his ear, whereupon he returned home. He affirms that from the injury to his ear he suffered great pain and has a permanent impairment of his hearing. The morning after the accident he wrote to the general attorney of defendant, explaining his condition. This afforded defendant an opportunity to test by inquiry the reliability of plaintiff's statements and the extent of his injury. Defendant did not avail of the opportunity thus within its power. The injury to the ear and hearing of plaintiff is corroborated by Dr. Robertson, a reputable practitioner of medicine, as we assume, the record showing nothing to the contrary. The measure of damages is primarily for the jury to fix, and we are not warranted in disturbing their award unless we are convinced from the record that it is excessive. Plaintiff's injuries were of a serious character. The pain suffered from the injury to the drum of the ear was severe, and this was followed by a permanent impairment of his hearing. Plaintiff also lost four teeth as a result of the accident. We are not inclined to hold that \$2,500 is more than a reasonable compensation for so painful and permanent injuries.

Complaint is made about the evidence in relation to expense for necessary medical attendance. Dr. Robertson testified that his services to plaintiff were worth \$200, but there is lacking any evidence that plaintiff either paid this or obligated himself to do so. This is not the legal test. In *Chicago & Erie R. R. Co. v. Cleminger*, 178 Ill. 536, it was held that the true test was whether a liability had been incurred to pay for the medical services. From the undisputed evidence of Dr. Robertson it is very plain that plaintiff incurred a liability to pay Dr. Robertson the amount the service rendered him was worth.

We have examined the evidence and rulings of the trial court thereon, about which defendant complains, and do not discover any reversible error in either the

admission or rejection of such evidence. The question asked Miss Tully concerning the speed of the car and her answer that "there was no change in speed", is of no importance as affecting the merits or the ultimate result, even conceding, as claimed by counsel, that the question asked was suggestive of the answer given.

Dr. Robertson was the attending physician, and it was permissible for him to testify concerning his knowledge, acquired as such attending physician, of plaintiff's suffering pain from the injury to his ear. These are said to be self-serving statements and as such inadmissible, and *Chicago City Ry. Co. v. Mauger*, 128 Ill. App. 512, and other cases to a like import are cited as authorities sustaining such contention. What was said in the cases cited had reference to physicians testifying as experts from examinations made of the injured party with the express purpose in view of qualifying to give testimony upon the trial. Were Dr. Robertson an expert witness and not the attending physician, the point would be well taken. But a different rule obtains in the case of an attending physician. This was stated in *W. C. St. Ry. Co. v. Carr*, 170 Ill. 478, in these words: "We think, however, the correct rule to be deduced from that laid down by *Greenleaf* and most conducive to justice, is that such declarations, being in favor of the party making them, are only competent when made as part of the *res gestae*, or to a physician during treatment. * * *

This view is in harmony with what we said in the *Illinois Central Railway Company v. Sutton*, 42 Ill. 438".

The watch-ticking test made by Dr. Robertson in an endeavor to test the hearing of plaintiff did not transgress the rules of evidence, nor did the testimony of Dr. Robertson describing the method pursued infringe any like rule. His statement was in effect as to what distance plaintiff indicated he could hear the watch tick, and in no sense an opinion of the witness as to whether he could hear the ticking of the watch at any particular distance. The attending-physician rule is

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likewise invokable in support of this latter evidence.

It follows from what has heretofore been said concerning the proofs that instruction 4, given at the request of plaintiff, states a correct legal principle applicable to this case. The burden of proof did shift to defendant, after plaintiff had made out his *prima facie* case, to repel by facts and circumstances the liability imputable to it under the case made by the plaintiff's evidence in chief. It would be otherwise under a declaration charging specific acts of negligence, for in such case the burden of proving the specific negligence charged by a preponderance of the evidence is the burden of the plaintiff throughout the trial.

Instruction 7 is also without error, for as we have already indicated, plaintiff was entitled to recover as a part of his damages any reasonable sum he was liable to pay for medical attendance. The complaint concerning the refusal to give instruction 28 is obviously imprudently made, for what appears in No. 28 was embodied in instruction No. 2, given at the instance of plaintiff. The latter instruction included the wilful exaggeration as well as wilfully swearing-falsely theory.

The whole record considered, justice seems to have prevailed, and the judgment of the Superior Court is affirmed.

Affirmed.

Albert Seith, Appellee, v. Commonwealth Electric Company, Appellant.

Gen. No. 14,001.

1. VERDICT—*what considered in support of.* The Appellate Court in determining whether the verdict of the jury will be disturbed will take into consideration the fact that the jury saw the witnesses and were able to observe their manner of testifying, their

frankness or prejudice, their interest or lack of interest in the cause or the parties, and were able therefrom to say who were entitled to the greater credence.

2. *NEGLIGENCE—when evidence sustains charge of, where injury results from live wire.* Held, that the evidence justified the verdict of the jury upon the question as to whether the defendant electric light company was negligent in connection with the injury resulting from coming in contact with a live wire.

3. *ELECTRICITY—when failure to obey ordinance negligence.* It is the duty of an electric light company which has accepted an ordinance to comply with its provisions enacted to protect the public from lurking dangers and a failure so to do resulting in injury to an individual constitutes actionable negligence.

Action in case for personal injuries. Appeal from the Circuit Court of Cook county; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed November 12, 1908. Rehearing denied November 30, 1908.

F. M. COX, F. J. CANTY and J. C. M. CLOW, for appellant.

MORSE IVES, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

The plaintiff was injured by coming in physical contact with a live electrical wire, the property of defendant, while said wire was upon the ground, having broken and fallen upon the public highway upon which plaintiff was travelling, as he lawfully might, when injured. A trial in the Circuit Court resulted in a verdict for \$4,000, upon which, after the overruling of motions for a new trial and in arrest of judgment, the trial court gave judgment. To these actions of the court defendant made objections and preserved exceptions.

While twenty-three assignments of error appear upon the record, the efforts of counsel in argument are mainly confined to the contention that the verdict and judgment are unsupported by the evidence and contrary to its preponderating force, and that the evi-

dence fails to disclose any actionable negligence of defendant.

There is a line of poles on Noble street, one of which is near the intersection of Grand avenue. On these poles are four cross arms. On the top cross arm the wires of defendant were strung. They were charged with a high voltage of electricity used in electric lighting. On the three other cross arms were strung telephone wires. The poles near the intersection of Noble street and Grand avenue are about 100 feet from each other. Plaintiff lived in a flat building, the first floor of which was occupied as a saloon on the southwest corner of Grand avenue and Noble street. On the 19th day of August, 1903, plaintiff left his flat by the outside back stairs and while walking on the west side of Noble street was struck in the breast with the live wire of defendant, which had previously broken and fallen to the ground. A policeman struck the wire with his club, causing the wire to strike plaintiff in the breast, whereupon plaintiff grabbed the wire with both his hands and was seriously burned with the escaping electric fluid. It appears that plaintiff was unconscious of his peril or the fact of the wire being upon the ground until it struck him in the breast. The electric wires of defendant at the point of the accident were not guarded or protected in any way.

Plaintiff declared upon section 6 of an ordinance of the city of Chicago granting an operative franchise to defendant passed June 28, 1897, and which reads: "The conductors and wires owned and operated by the said company under the provisions of this ordinance shall be properly insulated and all overhead conductors used by said company shall be protected by guard wires or other suitable mechanical device or devices".

Defendant contends that the wires were thoroughly insulated and in perfect condition; that they had been strung new less than nine months previous to the accident; that the breaking and consequent falling of the

wire could only be accounted for upon the theory that a kite, known to have been caught on the wires, and produced in evidence, became so entangled in defendant's wires that two of them were brought together, short-circuiting them so that the wire in question was burned out, broke and fell to the ground. Defendant further contends that the injuring of plaintiff was brought about as a result of his own carelessness; that he and a policeman discussed the condition of the fallen wire, the policeman insisting that it was alive and dangerous and plaintiff maintaining that it was dead and harmless; that plaintiff, in spite of the command of the policeman not to touch the wire, stooped and picked it up, with resulting injury.

From these facts it is claimed that there is no actionable negligence imputable to defendant. We must not lose sight of the fact, in arriving at our conclusion, that there is a sharp conflict in the evidence. This conflict it was the burden of the jury to reconcile. They saw the witnesses, whom we cannot see, and were able to observe their manner of testifying, their frankness or prejudice, which ever was apparent, their interest or lack of interest in the cause or the parties, if any, and were able therefrom to say who was entitled to the greater credence. The witnesses were from various walks in life and of much disparity in age. Two little girls thirteen years old, eye witnesses of the accident, were put upon the stand by plaintiff, and two policemen and a young man, who testified that he was a teacher in the Y. M. C. A. and also acted as barkeeper for his father, testified for defendant. The candor of immature youth may have rendered the testimony of the two little girls more trustworthy and convincing to the minds of the jury than the evidence of the policeman found in a saloon, and that of the young man whom the jury may have regarded as engaged in irreconcilable and incompatible employments.

What in fact caused the wire to break is largely a matter of conjecture. Defendant's theory that two

wires were short-circuited by the kite, made of a part of a Daily News, being upon the wires, is entirely lacking direct proof. It is in evidence that another kite, made of pink paper, had rested upon these wires between two and three weeks prior to the accident. If the breaking of the wires can be attributed to the interposition of a kite, then it was for the jury to say which kite was the proximate cause of the wires breaking. If they concluded the pink kite was the cause, they may have regarded it as negligence in defendant in permitting the pink kite to remain upon the wires so long a space of time, and not removing it. They may have concluded that defendant was negligent in permitting a live electric wire to be upon the ground at any time, and that the evidence of defendant fell short of rebutting the presumption of negligence thus arising. There is authority of law to support this proposition.

In affirming the judgment of the trial court it was said in *Denver Consolidated Electric Company v. Simpson*, 21 Colo. 371: "In substance the court instructed the jury that if they found that the defendant's wire was so charged with electricity as to become dangerous to persons coming in contact with it, and that the wire had been disconnected or detached from its fastenings and hung down in a public alley, so as to endanger public travel, that of itself was *prima facie* evidence of negligence on the part of the defendant". And it was held in *Larson v. Central Ry. Co.*, 56 Ill. App. 263, that proof of an injury occurring as the proximate result of an act which under ordinary circumstances would not, if done with due care, have injured any one, is enough to make out a presumption of negligence. That permitting a broken electric wire to hang loose in the streets, with proof of a resulting injury, makes out a *prima facie* case of negligence. The jury were warranted from the evidence, we think, in concluding that the broken wire was not sufficiently insulated, for if it had been it

might not have short-circuited from the intervention of either kite. Again, defendant contends that the wires were strung upon the arms of the poles in the ordinary and usual way; but even so, this is not sufficient to exculpate defendant from the negligence imputable to it from the falling of the wire. The ordinance which was pleaded and proven directed certain precautions to be taken by defendant in the stringing of its wires. This ordinance was accepted by defendant and was binding upon it. The witness, E. W. Leese, testified that guard wires were strung parallel and underneath the electrically charged wires with short wires strung crosswise every few feet to keep the charged wires from falling. It is admitted that no such guard wires were used or any other mechanical device to arrest the falling of the wires.

The ordinance *supra* was before the Supreme Court in *Commonwealth Electric Co. v. Rose*, 214 Ill. 545, and it was there held that the defendant was estopped from repudiating its conditions; that having advantaged of its benefits, it could not escape the liability imposed by it. Furthermore, that an ordinance granting the right to an electric company to erect poles and wires, and requiring the company to properly insulate the overhead wires and to protect them by guard wires "or other suitable mechanical device or devices" has the force of a statute, the violation of which, after acceptance and availing of its benefits, is *prima facie* evidence of negligence.

In case *supra* the Branch Appellate Court, by Mr. Justice Baker, said in 114 Ill. App. 181: "The defendant made no attempt to protect its overhead conductor, charged as it was, with an amount of electric current dangerous to human life, by guard wire or any mechanical device whatever. It is no answer to say that the ordinance did not provide whether the guard wire should be placed above or below the conductor. At this street crossing the telephone wires were above the conductor, and the guard wire to protect the con-

ductor from contact with the telephone wire must necessarily be placed above the conductor”.

The modern use of electricity, uncontrolled, is fraught with peril to human life. The ordinance was enacted to protect the public from such lurking dangers, and it was the duty of defendant to comply with the ordinance in such a way that its wires, highly charged with electric fluid, should not fall and be a menace to the life and limb of the public lawfully travelling upon the highway in their vicinity.

We think the jury were justified in finding from the evidence that defendant was guilty of the negligence charged and proven as proximately causing the injuries from which plaintiff suffered.

The two little girls, Gladys Leader and Dora Jensen, saw the wire in the street and, young as they were, realized the danger its continuance in the street was to passers by. They immediately entered Bachrach's saloon to notify him of the trouble and found two policemen there resting themselves. Their testimony in its material parts is corroborated by plaintiff, Albert Johnson and defendant's witness, Thomas Ableseth. They support plaintiff's statement that the wire came in contact with his person by one of the policemen striking the wire with his club. Opposed to this is the testimony of officer Megary that officer King hollered to plaintiff not to touch the wire and to get away from it; that plaintiff answered that it was a dead wire, and that King said, "Dead or alive, leave it alone", but that in spite of this warning plaintiff stooped and picked up the wire and in so doing was injured. Officer King testified in substance corroborating officer Megary. Defendant's own witness, Ableseth, flatly contradicts the two officers when he says that plaintiff did not stoop down and pick up the wire; that he caught the wire standing up, and that he did not hear either of the officers say anything. Philip Murphy, a police officer connected with the Chicago & Northwestern Railway, testified that he was in a saloon

on the southwest corner of Grand avenue and Noble street, and ordered a glass of beer, and saw through the bar mirror plaintiff pick up the wire. Under the circumstances we are not surprised that the jury were loath to place much credence in this evidence. It is not natural and challenges credulity somewhat to place reliance upon it. The remainder of Murphy's testimony is largely as to what took place after plaintiff was felled to the earth by the shock after coming in contact with the wire, and is unimportant. A good deal of Bachrach's testimony sustains the account of the two little girls, the only material variance being that plaintiff stooped down and picked up the wire. The jury had the right to disbelieve the testimony of this witness where it was in conflict with plaintiff's proof, if, from the manner and bearing of the witness, they concluded he was prejudiced or in any way unfair in this part of his evidence. The reliability of his testimony as a whole and the weight to be accorded it was for the jury.

James Kraemer, a blacksmith, testified for defendant that he saw the wire "bust and fall down" and plaintiff stoop down and pick up the wire and pull it through his hand until he came to the broken end, when he uncovered part of the wire. Kramer admits that when approached after the accident by two men, he told them he did not know anything about the accident and did not want to. The jury may have believed the latter and not the former statement of Kraemer. The whole evidence considered, we are in accord with the finding of the jury. The verdict is clearly sustained by a preponderance of the proofs. No question is made of the nature and extent of plaintiff's injuries, therefore there is no controversy here challenging the justness of the damages awarded.

Finding no reversible error in this record, the judgment of the Circuit Court is affirmed.

Affirmed.

Caroline Kneip et al., Appellees, v. Charles H. Schroeder, Appellant.

Gen. No. 14,778.

1. **TRIAL**—*when should be advanced.* A party restrained from constructing a building should be accorded a speedy trial and the cause advanced if a hearing upon *ex parte* affidavits has been unsatisfactory and such as to require the chancellor in the exercise of his discretion to maintain the *status quo* by injunction.

2. **INJUNCTIONS**—*when should be awarded.* An injunction upon *ex parte* affidavits should be awarded when the showing made by the respective parties is such as to preclude a satisfactory decision, if it is essential that the *status quo* be maintained in order that ultimate justice may be done.

3. **INJUNCTIONS**—*when order with respect to construction of building not void for uncertainty.* Held, that the injunction granted in this case was not void for uncertainty where it restrained the defendant from placing the front wall of his building upon a certain position with respect to the building line which was in dispute.

Bill for injunction. Appeal from the Superior Court of Cook county; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the March term, 1908. Affirmed. Opinion filed November 12, 1908.

ARNOLD TRIPP, for appellant.

CHARLES A. WILLIAMS and J. B. LANGWORTHY, for appellees.

MR. JUSTICE HOLDOM delivered the opinion of the court.

The chancellor in the court below granted a temporary injunction, in accord with the prayer of the bill, restraining appellant from erecting a building on the property owned by him described as lot 22 and the south half of lot 21 in block 8, in Lane Park addition to Lake View, within twenty feet of the front lot line.

The appellees are owners of property improved with residences upon Janssen avenue, the street upon which appellant intends to build an apartment house build-

ing. The right to an injunction is predicated on the alleged facts that on both sides of Janssen avenue, between Roscoe and Cornelia streets, where the property of all the contestants is situated, there is, by the plat of the subdivision, a building line restricting the erection of buildings to within twenty feet of the street lot line; that this restriction has been recognized by all the owners, including the parties to the bill, who have built and maintained their several houses in accord therewith; that appellant, in addition to the premises in dispute, is the owner of lots 40, 41 and 42 in the same block, and on said lots has erected buildings in conformity with the restrictive building line.

The bill, on the point of uniformity of action of the building property owners, alleges that "throughout the history of the subdivision, and from the time the first improvement began until the present time, there has never been any violation or infraction of the building line as established and shown on the plat, and that all improvements were made with reference to the building line".

The injunctional order was granted after a hearing of the parties on proofs resting in *ex parte* affidavits. No witnesses were produced for cross-examination, neither was the answer of appellant to the bill filed. By the affidavits of appellant it is averred that none of the property holders on either side of the Janssen avenue block designated have constructed their improvements within the twenty-foot building line, but that all of them, including appellant, have more or less disregarded the building line and placed portions of their buildings outside of the building line, and that to the time of the filing of the bill all the lot owners have acquiesced in such violations and refrained from making any protest. Two surveys made by different surveyors form a part of the affidavits read upon the hearing. They purport to show the front line of the several improvements, but they are not in accord.

Appellant asks a reversal of the injunctional order

upon three grounds, viz: (1) Because there exists no building line that any of the property holders, including appellees, have ever lived up to; (2) because the character of the property has changed, and appellant's lot is no longer adaptable for residence purposes, and (3) that the injunctive order is void, because it is indefinite and incapable of being understood.

In the conclusion at which we have arrived it is unnecessary for us to pass upon the merits of the controversy, either upon the facts or the law, as they will not become factors in construing the rights of the parties until a full hearing has been had and a decree on such hearing rendered by the chancellor.

Whether or not the building line, the existence of which appellant admits, has been disregarded by the property owners so as practically to work its abrogation as a restriction, depends upon the facts as to the manner of the construction of existing improvements with reference to said building line, and upon the law as to whether stoops, steps and piazzas erected upon the restricted twenty feet are violations of the building line compact. This we are unable to decide from the conflicting affidavits of the several parties. They are *ex parte*, and, in the absence of cross-examination of the affiants, entirely unsatisfactory. Neither are we able to say from the affidavits submitted that the character of the property has changed so that in law the building line restriction is no longer binding. All these questions affecting the rights of the parties can be settled after a hearing upon the bill, answer and replication, where the facts may be demonstrated in the usual manner and the witnesses of the several parties submitted to cross-examination by the opposing party. We think that, as the cause was presented to the chancellor in the unsatisfactory way in which it was, he had no alternative but to grant the temporary restraining order sought by the bill to preserve the *status quo* between the parties; but we suggest that

appellant should not be delayed in the construction of his proposed building more than is absolutely necessary to a proper and impartial hearing of this controversy, and we suggest that it is a case where the chancellor would be justified in speeding the cause and granting as early a hearing as the state of his docket will permit in justice to other litigants in his court.

The state of the litigation here involved is in reasoning and analogy very similar to the state of the case in *Child v. Douglas*, 54 Eng. Chan. Rep. 739, in which Lord Justice Sir Knight Bruce said: "As to three of these four points, the present impression upon my mind, on the materials before the court, is unfavorable to the plaintiff's case. Still, if the act intended to be done by the defendant were one which if completed would substantially or seriously prejudice the plaintiff or his house, I should probably have been disposed, even with the view which I take of three of the points, to interfere by injunction, until the question in dispute could be decided at the hearing". So in this case, if the temporary injunction should be denied and the defense of appellant fail upon the final hearing, the act of building if completed would, in such circumstances, not only substantially but seriously prejudice appellees and their property.

We are unable to accord our assent to the contention of counsel that the injunctional order is void for uncertainty. The restriction is solely to the placing of the front wall of the building, without regard to any other part of such structure.

The order of the Superior Court granting a temporary injunction is affirmed.

Affirmed.

George N. Watson, Appellant, v. Ralph Cudney, Appellee.**Gen. No. 14,967.**

1. **CHATTEL MORTGAGES**—*what essential to justify foreclosure under insecurity clause.* In order to justify the foreclosure of a chattel mortgage under an insecurity clause and the appointment of a receiver, facts must be stated upon which the mind of the court can be attuned to the conclusion that the security was imperiled; such facts must arise from the acts of the parties or changes in values occurring subsequent to the execution of the mortgage.

2. **RECEIVERSHIPS**—*who disqualified to act.* A receiver should be an impartial and indifferent person. Neither a party to a suit nor a trustee, whose business it is to watch a receiver, should be appointed. These rules however relax in the interests of all the parties and are therefore not without exception.

3. **RECEIVERSHIPS**—*what essential to appointment.* Either the bond required by statute should be given or the court should find upon notice and a full hearing that the bond required by statute shall be dispensed with in order that a receiver may properly be permitted to act.

4. **RECEIVERSHIPS**—*when order of appointment indefinite.* Held, that the order appointing the receiver in this cause was indefinite and did not cover all of the contingencies which should be provided for by such an order.

Bill to foreclose. Appeal from the Superior Court of Cook county; the Hon. GEORGE A. DUPUY, Judge, presiding. Heard in this court at the October term, 1908. Reversed. Opinion filed November 12, 1908.

JOSEPH W. LATIMER, for appellant; BLUM & BLUM, of counsel.

EUGENE E. PRUSSING, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Appellant, on July 1, 1908, made and delivered to appellee a chattel mortgage conveying certain personal property used in the conduct of a restaurant at

194 North State street, Chicago, and the interest of appellant in the leasehold of that place, to secure his note of even date for \$400, payable to appellee or order on or before one year after date. The bill in this record was filed to foreclose the mortgage and subject the chattels and the leasehold interest of appellant to the payment of the sum of \$367, due appellee on the note. The bill alleges that on August 13, 1908, appellee, feeling "himself unsafe and insecure in said indebtedness", took possession of all the mortgaged property he could discover, including the leasehold interest of appellant in the premises at 194 North State street, and still held such possession; that appellee advertised the mortgage property for sale at 11 o'clock A. M. of August 24, 1908, at which time the sale was adjourned by proclamation until August 31st following, at the same hour; that one Hall, through whom appellant derived his leasehold title, claims as lessee of the owner, to be the owner of the leasehold, and denies having at any time parted with the same to appellant or any other person, and that Hall, by a subterfuge, obtained entrance into the leasehold premises, and by force continues; and that said Hall threatens to announce at the sale under the chattel mortgage, that he is the owner of the leasehold, and that appellee has neither right, title nor interest therein, and that said announcement will tend greatly to reduce the amount which appellee, but for said asserted claim, would derive at such foreclosure sale; that one Borter, the landlord of the leasehold premises, refuses to recognize appellee's rights as assignee of the leasehold, but on the contrary maintains the claim of said Hall; that Borter threatens to announce at a sale that purchasers will be required to remove chattels purchased from the leasehold premises, for the reason that appellee has no title or valid claim thereto. The bill also avers that the leasehold interest is the most valuable asset as security for the indebtedness of appellant, prays for an ascertainment

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of the rights of the different claimants, the establishing of the lien of the chattel mortgage to appellee on the property therein described, including the leasehold, the ascertaining of the amount due appellee, ordering its payment, and, in default of such payment, directing a sale of the mortgaged property freed from the claims of the several claimants, and also prays for an injunction restraining the several claimants from molesting appellee's possession and for a receiver, etc.

On the day the bill was filed appellee also filed his petition for the appointment of a receiver, and represented *inter alia* that "in order to protect his security and until the rights of the parties hereto shall be fixed and determined * * * is willing and does hereby offer to open up the restaurant * * * and conduct the same without expense to any of the parties hereto, and at the hazard and risk of petitioner, and will pay and discharge the rent to accrue for the use of said premises, * * * that in that regard your orator will give such bond in the premises as the court may think reasonable and proper; that your petitioner is willing to act as such receiver without compensation therefor, and will give such bond in that behalf as to the court may seem just; provided, however, that should your petitioner be able to make any profit in the conduct of such restaurant, the said profits shall be the property of your petitioner".

On September 2, 1908, a certain injunctive order was entered, and also an order appointing appellee receiver on giving bond in the penalty of \$1,000. The latter order is in the following terms: "That Ralph Cudney be and he is hereby appointed receiver of all the goods and chattels and leasehold estate constituting the restaurant business in the premises at 194 North State street * * *; that he take possession thereof with the power of receivers in like cases, and insure the same for the benefit of whom it may concern; that

he is hereby authorized at his own risk and hazard to re-open and conduct the said restaurant business conducted on said premises, using said goods and chattels for such purpose, and that any profits that may be made by said Ralph Cudney shall be retained by him for his compensation; that while he so conducts the business he shall pay the rent of said premises. * * *

Appellant seeks by this appeal to reverse the order appointing appellee receiver.

The appointment of a receiver *pendente lite* is undoubtedly a matter resting in the sound discretion of the chancellor, but it is never to be arbitrarily exercised. While, in the light of the disputed ownership of the leasehold interest and the dual claim of possession by appellee as a mortgagee in possession, and Hall actually in possession, claiming ownership of the leasehold, and his threats and that of the landlord to do acts which tend to endanger the value of appellee's security, might in themselves create such a condition as would authorize the appointment of a receiver, still there was something antecedent to all this which must exist to constitute a foundation for the court to exercise its power to appoint a receiver. Such antecedent condition was a showing of a right to foreclose the mortgage. The mortgage, by its covenants, gave the mortgagee the right to foreclose the same in the event of his feeling that his security was unsafe or insecure. Appellee averred in his bill that he took possession of the mortgaged property because he felt unsafe and insecure "in said indebtedness and security". This is clearly a conclusion without reason or instance to support. It is insufficient to support a right to take possession, much less to form the basis of an order so far-reaching as the appointment of a receiver. It is not sufficient to state conclusions; facts must be stated upon which the mind of the court can be attuned to the conclusion that the security was imperiled. Such facts must arise from the acts of the parties or changes

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in values occurring subsequent to the execution of the mortgage. *Furlong v. Cox*, 77 Ill. 293; *Roy v. Goings*, 96 Ill. 361; *Slingo v. Steele Wedeles Co.*, 82 Ill. App. 139.

The contention that averments of such facts were not essential because appellee was a mortgagee in possession at the time of filing the bill is without force. He appealed to a court of conscience and it behooved him to establish that he had proceeded equitably in all he had done in the matter of his claim.

The power to appoint receivers is the prerogative of a court of equity, but that power is subordinate to legislative action, wherever a statute exists in any wise limiting or defining the power. It is seldom exercised in cases where other legal remedies are adequate to protect the moving parties' rights. Nor will a party to the action be appointed, except upon an agreement of the parties in interest, and seldom, if ever, against their protest. *Benneson v. Bill*, 62 Ill. 410.

A receiver should be an impartial and indifferent person. *High on Receivers*, sec. 63.

Neither a party to a suit nor a trustee, whose business it is to watch a receiver, should be appointed. *Kerr on Receivers*, 126. The interests of all parties, however, should be considered, so that these rules are not without exceptions. *Taylor v. Life Association of America*, 3 Fed. R. 465.

The appointment of receivers is in some respects controlled, as applied to the case at bar, by the statute. See Session Laws of 1903, title Receivers. By section 2 the chancellor may, in his discretion, in lieu of appointing a receiver, permit the party in possession to retain such possession on giving bond. The appointment in this case was the appointment of appellee as receiver, and therefore not under the section of the statute *supra*. Section 1 of the Act *supra* provides "that before any receiver shall be appointed, the party making the application shall give bond to the adverse party in such penalty as the court or judge

may order, and with security to be approved by the court or judge, conditioned to pay * * * provided that bond need not be required when for good cause shown and upon notice and full hearing, the court is of opinion that a receiver ought to be appointed without such bond." The record fails to disclose that the applicant gave the bond required by the foregoing section. Neither can we find from the record that the court upon notice and a full hearing was of the opinion that the bond called for by the statute should be dispensed with. The record conveys no intimation of the opinion of the court upon this subject. To entitle appellee to the appointment of a receiver, he must as a *sine qua non* to the enforcement of that right give the bond required by the statute, unless it is the opinion of the court that a receiver ought to be appointed without bond, and then the court's opinion must affirmatively appear in the order making the appointment. The statutory requirement in this regard cannot be dispensed with. It was evidently enacted for the purpose of making liable the moving party in a receivership proceeding, for such damages as might result from the improvidence of his act in bringing about a receivership where none should have been asked.

The order allowing compensation to appellee as receiver of all the profits he might make in operating the restaurant, with the mortgaged property, is so indefinite in its ultimate operation as to be erroneous. All appellee was entitled to receive was the amount due him on his debt. When this was accomplished, in whatever way, appellant, the mortgagor, was entitled to receive, upon demand, the mortgaged chattels. Appellee seems to have proceeded upon the assumption that but little or no profit would result from the operation of the restaurant. This assumption we cannot adopt, in the absence of proof. Neither can we assume that appellee would desire to run the restaurant unless there was a reasonable expectation of profit to be realized from so doing. If appellee was entitled to

"appropriated and levied for the Corporate Expense Department" so many dollars to "W. W. Weare or bearer" or "The Lincoln Bank or bearer" (according also to the date of the warrant), with interest at $4\frac{1}{2}$ per cent. per annum from date. The warrants recited also that they were payable solely from the taxes of 1905 or 1906, as the case might be, when collected, and not otherwise; and that such taxes were pledged to their payment, etc. They were signed by Timothy J. Buckley as town clerk, and George Comerford as president.

On April 25, 1905, Grisko as *treasurer* had deposited with "William W. Weare & Co., Bankers", \$399.95, and on May 1, 1905, \$5,000, and these sums had been credited to "Louis Grisko, Treasurer", on the ledger of the Lincoln Bank. The second item at least was a check from the town collector. Grisko was given a bank pass-book in the usual form of the bank, which was entitled "William W. Weare & Co., Bankers, Morton Park, Ill., in account with Louis Grisko, Treas".

The first two items were:

Cr.	
1905.	
April 25, F.	\$ 399.95.
May 1, W.	5000.00.

In the ledger of the bank the corresponding entries also appear:

1905	fol.	Debit.	Credit.	Balance.
April 25,	207 dep.		399.95	399.95.
May 1,	211 dep.	5000.00		5399.95.

The next succeeding items on the Bank ledger, however, are debit entries.

The Bank by arrangement paid on presentation any general warrants issued by the Town of Cicero and brought to them for cashing. These general warrants were for the ordinary, usual expenses of the town, and were signed by the president and clerk of the

town, and stamped across the face payable at the Lincoln Bank.

During May, 1905, a check of the treasurer's for \$250 and twelve general warrants aggregating \$2,411.61 were presented (on different days) to the bank and paid by the cashier, who, as each item was paid, entered it as a debit entry on the "Grisko, Treas." ledger account, and made the "balance" carried out on the right of the page correspondingly less.

On May 13th this balance is shown as \$2,738.34. On May 15th Grisko deposited with Weare & Co. a check on the Chicago Bank in which he kept town funds for the full amount of these warrants—\$2,411.61—making up the balance again to the \$5,399.95 deposited, less the \$250 check, or \$5,149.95.

The cashier testifies that after that time, although the bank was continually paying general warrants presented to it, there were no charges of them made against the Grisko, Treas. account, but that they were held as cash slips in the cash drawer until a considerable sum had accumulated, and then some messenger from the bank would go down to the town hall and get a check from Buckley to be signed by Grisko and countersigned by Buckley for their amount. This course, the cashier said, was taken by Mr. Weare's instructions. When Atkinson took possession of the bank he directed that the same course should be continued.

It is of course evident from this that some arrangement not to deplete the treasurer's balance in the Weare and Lincoln Bank had been made for the benefit of somebody.

Mr. Grisko says that being no bookkeeper, he employed Mr. Buckley for \$250 in 1905 and \$500 annually in 1906 and 1907, to keep his books and transact all his business, and that he had no explanation of paying back the \$2,411.61 to the Cicero Bank by a check on the Chicago Bank to make, except that he depended entirely on Buckley and signed any check or did anything Buckley suggested without hesitation. As to

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the city. It is merely assumed in the information that there is such an office. This is not sufficient. *Hedrick v. People, supra*, p. 377. It is matter of substance to show that there is such an office *de jure* as that of crib-keeper, and the information, in not showing this, is fatally defective.

The judgment in the cause could not well be more informal than it is. Appellant's counsel say it is not a judgment, but a mere direction to the clerk to enter a judgment, and it is certainly somewhat obnoxious to this criticism. The judgment reads: "It is hereby ordered, adjudged and decreed by the court in favor of the relator and of ouster with costs", etc., thus creating at least uncertainty whether it is a judgment of ouster in favor of The People, or not.

The judgment against the relator for costs is authorized by section 6 of the *quo warranto* act. Such defects as there are in the judgment will, probably, not occur in any future judgment which may be rendered in the cause by the trial court. The court erred in overruling the demurrer to the information and in rendering judgment against appellant for costs. For these errors the judgment will be reversed and the cause remanded.

Reversed and remanded.

Jacob H. Leshner, Appellant, v. United States Fidelity & Guaranty Company, Appellee.

Gen. No. 14,011.

1. PLEADING—*what declaration need not allege.* A declaration relying upon a bond which provides that suit hereon must be brought, if at all, within a specified period, need not set up excuses for failure to bring suit within such time in order to state a cause of action.

2. PLEADING—*what question not raised by demurrer.* A demurrer raises no question as to whether a plea is or is not regularly filed.

3. STATUTE OF LIMITATIONS—*what does not adjudicate defense of.*

To overrule a demurrer to a declaration which excuses in advance of pleading the defense of limitation, is not to adjudicate the question of the propriety of the limitation defense, as such defense must be set up by way of plea and the allegations of excuse contained in the declaration are no part of the cause of action.

4. *CONTRACTS—what limitation period for commencement of action not void.* A provision of a bond requiring suit to be brought thereon, if at all, within a specified period, is not unreasonable, if where at the time of the expiration of the limitation the amount of damages sustained by reason of default under the bond could not be ascertained,—a technical breach having occurred action might be brought and at least nominal damages recovered by virtue of which subsequent assessments of damages could be had under the statute.

5. *BONDS—nature of assessments of damages under subsequent breaches.* Assessments of damages, under section 20 of the Practice Act, are not new suits.

Action in debt. Appeal from the Superior Court of Cook county; the Hon. AXEL CHYTRAUS, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed November 12, 1908.

WILSON, MOORE & McILVAINE and EDWIN WHITE MOORE, for appellant.

JUDAH, WILLARD, WOLF & REICHMANN, for appellee.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

November 25, 1903, the appellant, Jacob H. Leshner, brought suit against the appellee, the United States Fidelity & Guaranty Co. and Henry W. Schlueter. May 6, 1906, the suit, on appellant's motion, was dismissed as to Schlueter. The suit is on a bond of date August 25, 1902, in the penalty of \$50,000, executed by appellee and Schlueter to appellant. One of the conditions of the bond is as follows:

"Third. That in no event shall the surety be liable for a greater sum than the penalty of this bond, or subject to any suit, action or other proceeding thereon that is instituted later than the 15th day of March, A. D. 1903".

In an amended declaration, filed May 6, 1905, there

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is set out, in words and figures, next after the formal commencement, a contract, dated August 22, 1905, between Henry W. Schlueter and J. H. Leshner, by which Schlueter agrees to construct a building and provide all material and work for the same, according to certain specifications and plans shown on drawings prepared by certain named architects. Article 6 of the agreement provides: "The contractor shall complete the several portions and the whole of the work comprehended in this agreement by and at the time hereinafter stated, the entire work of this contract to be completed on or before December fifteenth, 1902". The bond, a condition of which is above quoted, is then set out, followed by assignments of breaches of the conditions of the bond, one of which is as follows:

"And for assigning a further breach of the condition of said writing obligatory, plaintiff says that by the contract with the plaintiff above herein described the said Schlueter covenanted and agreed that the entire work described in the said contract should be completed on or before December 15th, 1902; but the plaintiff avers that the said Schlueter did not complete the said building within the said time, nor for a long time thereafter, to-wit, six months, and that due notice of such default was given to the defendant at the time and in the manner required by said writing obligatory; that said building was an office and store building, for office and mercantile purposes, as shown in the plans and specifications described in said contract, and this was well known to the said Schlueter and to the defendant herein; and it was well known to the said Schlueter and to this defendant that in case the said building should not be completed by the time aforesaid plaintiff would be deprived of a large amount of gains and profits which he would otherwise make as and for the rentals and rental value thereof during the time that would be lost by such default; nevertheless, the said Schlueter did not nor would, although often requested, complete the said building at the time required by said contract, nor within the period last above mentioned, and that the rentals and rental value of the said prop-

erty during the said period, which the plaintiff lost thereby, was very great, to-wit, the sum of ten thousand dollars", etc.

The declaration, in the concluding part thereof, contains the following averments:

"And plaintiff further shows that the plaintiff on his part complied with all and singular the provisions and requirements of the said writing obligatory on his part to be kept and performed, excepting only that this present action by the plaintiff against the said defendant was not brought on or prior to March 15, 1903; and in respect to said provision or requirement of the said writing obligatory the plaintiff avers that the said building which should by the terms of said contract have been completed by December 15th, 1902, was not in fact completed for a long time, to-wit, for the period of eleven months thereafter, and that on March 15th, 1903, the said building was in an uncompleted state and the said Schlueter was still engaged in the construction thereof and in laboring in and about the same with numerous employes and sub-contractors; and that it was not known to the plaintiff at the said date, and could not have been known at the said time nor until long afterwards, to-wit, eleven months, what injury, loss or damage, if any, would be sustained by the plaintiff by reason of said breach of contract, nor whether the said Schlueter would himself indemnify and save harmless the said plaintiff from any pecuniary loss resulting from such breach of the terms, covenants and conditions of said contract; and that the said loss or damage could not have been known to the plaintiff until shortly before the time when he brought this present action; nor could the plaintiff, until the last work done or caused to be done by the said Schlue-ter upon the said building had been completed, have known or in any way ascertained the amount which the defendant herein ought to pay the plaintiff by virtue of the covenants and provisions of the said instrument; nor could plaintiff by any means know or

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ascertain that the defendant herein would decline or refuse to make good, without suit, the amount of such loss or damage when ascertained; by reason whereof the plaintiff avers that the said provisions of said writing obligatory that action thereon should be brought by March 15th, 1903, was unreasonable and void; and that plaintiff was not in any way bound thereby."

Appellee demurred to the declaration generally and specially, and the court, July 8, 1905, overruled the demurrer and ruled appellee to plead to the declaration within thirty days, which time was subsequently extended till September 30, 1905. September 25, 1905, appellee filed thirteen pleas. Appellant demurred generally and specially to the 1st, 3rd, 5th, 6th, 7th, 8th, 9th, 11th and 13th pleas. The 13th plea is as follows:

"And for a further plea in this behalf, the defendant says the plaintiff ought not to have his aforesaid action against it, the defendant, because it says that the plaintiff did not commence his said action on or before the 15th day of March, A. D. 1903, but, on the contrary thereof, commenced his said action on or about the 27th day of November, 1903, contrary to the terms and conditions of the said writing obligatory; and this the defendant is ready to verify; wherefore it prays judgment if the plaintiff ought to have his aforesaid action, etc".

The following causes of demurrer are assigned: "The said thirteenth plea is not a sufficient plea to the said declaration, since it sets up and relies upon matters which are defenses of law alone". The said thirteenth plea is not sufficient as a plea to the said declaration, since it sets up matters and things already adjudged and determined against the defendant by its demurrer to the plaintiff's declaration".

June 15, 1907, the court overruled appellant's demurrer to appellee's thirteenth plea; appellant elected to stand by its demurrer, and the court rendered judgment in favor of appellee for its costs, and appellant prayed and was allowed an appeal.

Appellant has assigned as error the overruling his demurrer to appellee's thirteenth plea. Appellant's counsel rely on the following proposition:

"That the right of appellant to maintain this suit notwithstanding the limitation was determined by the decision of the Superior Court on the demurrer to the declaration, and that appellee having obtained leave of the court to plead over and having filed various pleas, including the general issue, finally and definitely waived all objections to the amended declaration, and cannot be heard again to raise the same questions, and that the court erred in not sustaining appellant's demurrer to the thirteenth plea".

Counsel, in this proposition, and also in their argument, assume that the court, in overruling appellee's demurrer to the declaration, conclusively adjudged that the matter of appellee's thirteenth plea is not a bar to the action. This assumption is unwarranted by any rule or principle of common law pleading. "Pleading is the statement in a logical and legal form of the *facts* which constitute the plaintiff's cause of action, or the defendant's ground of defense; it is the formal mode of alleging that on the record which would be the support or the defense of the party in evidence". 1 Chitty on Pl., 5 Am. ed., sec. 195; Kilgore v. Ferguson, 77 Ill. 213, 215.

"In general, whatever circumstances are necessary to constitute the cause of complaint, or the ground of defense, must be stated in the pleadings, and all beyond is surplusage". 1 Chitty on Pl., sec. 196, top p. 195; Heard's Stephen on Pl., 9 Am. ed. p. 422; Heard's Gould's Pl., 5th ed., pp. 41, 43; Ill. Steel Co. v. Schymanowski, 59 Ill. App. 32, 39; Liebold v. Green, 69 *ib.* 527, 533; Burnap v. Wight, 14 Ill. 301; Barnes v. Northern Trust Co., 169 *ib.* 112, 118.

Matter of defense need not be stated in a declaration, because it comes properly from the other side. 1 Chitty on Pl., sec. 205; 4 Joyce on Insurance, parag. 3684.

The appellant's cause of action is a breach or breaches of the contract between Schlueter and appel-

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lant, and, manifestly, the averment in the declaration that appellant did not commence his suit prior to March 15, 1903, and the averment, by way of excuse, for the omission so to do, are not facts constituting, or tending, with other facts, to constitute his cause of action. That appellant did not commence suit before March 15, 1903, is matter of defense, and if the appellee should plead this in bar of the suit, any valid reason which appellant might have for not commencing suit before that time he might reply. In *Andes Co. v. Fish*, 71 Ill. 620, the court, referring to *P. F. & M. Ins. Co. v. Whitehill*, 25 Ill. 382, say: "It is true, in the first of these cases it was said, that there should be a proper averment of the facts relied on to excuse the delay in bringing the suit, in the declaration, which was not done here; but that remark was unnecessary to the decision of the question then before the court, and cannot be held as committing us to the doctrine that it is indispensable that such facts be averred in the declaration. This provision in the policy, requiring suit to be brought for loss within twelve months after the loss occurs, is, in that opinion, previously discussed, and upheld upon the principle that it is a reasonable limitation upon the bringing of such suits. Adhering to that reasoning, as we still do, it logically follows that the same rules of pleading should be allowable in respect to it as to other limitations of actions, and that the limitation, if insisted upon, should be set up by the defense, when the plaintiff may reply the facts relied upon as excusing what would otherwise have been *laches* in bringing the suit".

In 4 *Joyce on Insurance*, sec. 3223, the author says: "In a suit brought after the expiration of twelve months it is not necessary for the plaintiff to allege any excuse for not bringing it within the time, but the same rule of pleading applies as to other limitations of actions. If it is insisted upon, it must be set up by the defense, and the plaintiff may then reply to the facts relied upon as his excuse for not bringing his suit within the

time limited''. See, also, *Corrigan v. Reilly*, 64 Ill. App. 124.

A demurrer does not reach surplusage, the reason being *utile per inutile non vitiatur*. Heard's Stephen on Pl., sec. 424, top p. 423; *Burnap v. Wight*, 14 Ill. 307, 303.

Surplusage may be rejected by the court and need not be proved. Heard's Gould's Pleadings, top pp. 149-50. And it may be struck out on motion. Heard's Gould's Pl., top p. 143, note.

Appellee's counsel, while assigning special grounds of demurrer to the declaration, did not specially demur to appellant's admission that it did not commence suit within the time limited by the bond, or its alleged reason for that omission. It is familiar law that the statute of limitations, to be availed of, must be specially pleaded as defense. The same rule applies in the case of a contractual limitation. 4 *Joyce on Ins.*, sec. 3223.

The law being as stated appellant's alleged reasons for not commencing suit before March 15, 1903, were not before the court for consideration, in passing on appellee's demurrer to the declaration. Therefore, the court did not, in overruling the demurrer, adjudge appellant's right, notwithstanding the limitation, to maintain his suit, as his counsel claim. The 13th plea of appellee is a plea in bar of the action. The sole question raised by appellant's demurrer to the plea is, whether it is a sufficient plea in bar. Manifestly, the demurrer raised no question as to whether the plea was or was not regularly filed. Appellant, by demurring to it, invited consideration as to its validity by the court, and while appellant may properly call in question the correctness of the court's decision overruling the demurrer to the plea, he is not in a position to complain that the court considered the plea and passed on its sufficiency. In other words, he cannot complain of the court having done that which, by his demurrer, he impliedly requested the court to do.

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But counsel for appellant contend that the limitation, which is pleaded in bar by appellee, is unreasonable and invalid, for the reasons set forth in the declaration, quoted *supra*, viz.: that the building was not completed December 15, 1902, and was uncompleted March 15, 1903, and that it was not known to appellant at the last date, and could not have been known to him till shortly before bringing suit, what loss or damage would be sustained by appellant, etc. Counsel, after quoting the provision in the contract, that "should the contractor fail to complete the work on or before the date agreed upon, he shall pay to or allow the owner, by way of liquidated damages, the sum of \$1,000 *per diem* for each day thereafter that the work remains uncompleted", and after stating that the delay in the completion of the building was the main element of loss, say: "In view of this situation, is it possible that the parties could have intended to agree that although the bond was given to secure that particular element of loss, and covenanted in terms that the builder 'should well and truly indemnify and save harmless the obligee' therefrom, nevertheless if the loss should be so substantial and the delay so material as to extend beyond March 15, the damage to the obligee, although largely increased by that circumstance, could not be recovered at all?"

Section 20 of the Practice Act is as follows: "In actions brought on penal bonds, conditioned for the performance of covenant, the plaintiff shall set out the conditions thereof, and may assign in his declaration as many breaches as he may think fit; and the jury, whether on trial of the issue or of inquiry, shall assess the damages for so many breaches as the plaintiff shall prove, and the judgment for the penalty shall stand as a security for such other breaches as may afterwards happen, and the plaintiff may, at any time afterwards, sue out a writ of inquiry to assess damages for the breach of any covenant or covenants contained in such bond, subsequent to the former trial

or inquiry; and whenever execution shall be issued on such judgment, the clerk shall endorse thereon the amount of damages assessed by the jury, with the costs of suit, and the sheriff or coroner shall only collect the amount so indorsed: *Provided*, that in all cases where a writ of inquiry of damages shall be issued for any such breaches subsequent to the first trial or inquiry, the defendant, or his agent or attorney, shall have at least ten days' notice, in writing, of the time of executing the same". Hurd's Stats., p. 1534. Section 35 of the Practice Act of 1907 is the same. Laws 1907, p. 444.

Appellant was entitled to sue on the first breach, which, so far as appears from the record, was the noncompletion of the building by December 15, 1902. Under section 20, appellant could have commenced suit prior to March 15, 1903, for this breach, and could have recovered at least nominal, if not actual, damages, and thereafter might have sued out writs of inquiry and assigned subsequent breaches. *Dent v. Davison*, 52 Ill. 109; *McDole v. McDole*, 106 *ib.* 452.

Appellant's counsel say that the subsequent proceedings authorized by section 20 are equivalent to new suits; but the court, in *Dent v. Davison*, *supra*, shows that the very object of the section is to prevent multiplicity of suits. Counsel insist that the limitation in question should be construed so as not to apply to damages which could not accrue until the building should be completed. The language of the limitation is, "In no event shall the surety be liable for a greater sum than the penalty of this bond, or subject to any suit, action, or other proceeding thereon, that is instituted later than March 15, 1903". The language limiting a suit or action is too plain and unmistakable to require or even admit of construction. In *Johnson v. Humbolt Insurance Co.*, 91 Ill. 92, the condition of the policy was, that no suit or action against the company should be sustained, unless such suit or action should be commenced within

Leshner v. U. S. Fidelity & Guaranty Co., 144 App. 632.

twelve months after the loss should occur. The court held that the language meant twelve months after the fire, and said: "All persons know that in giving force to laws and contracts of every description, the intention as therein expressed must govern. That intention must and can only be sought in the language employed in the instrument itself, and from the ordinary or popular meaning of the words themselves, unless it is apparent they are used in a technical or particular sense".

Counsel, contending that the construction should be liberal in favor of appellant, cite numerous authorities to the effect that companies such as appellant are insurance companies. In 1 Joyce on Insurance, paragraph 209, the author says: "The cases are numerous which hold that the first object of construction is to ascertain the intentions or meaning of the parties, and to understand the contract accordingly". Also: "We suggest that, if the words are clear and precise, it is not an unreasonable presumption that the parties intended that meaning which the words used fairly express, even though the parties may have actually intended otherwise"; and in paragraph 219 it is said: "If the terms of the contract are express, the court cannot extend or enlarge the contract by implication, so as to embrace an object distinct from that originally contemplated".

Appellant must be presumed, in the absence of evidence to the contrary, to be of ordinary intelligence, and no man of ordinary intelligence can, as we think, misunderstand the very plain language of the limitation. It was provided, in the building contract, and contemplated by the parties to that contract, that the building would be completed by December 15, 1902, and the limitation of suit to March 15, 1903, three months from the former date, is not unreasonable.

In Riddlesbarger v. Hartford Insurance Co., 7 Wallace, 386, the court, referring to the limitation clause in the policy, say: "It is clearly for the interest of

the insurance companies that the extent of losses sustained by them should be speedily ascertained, and it is equally for the interest of the assured that the loss should be speedily adjusted and paid". *Ib.* 340.

We can find no reason for holding that the limitation clause in question is unreasonable, and are of opinion that it is valid and binding and should be enforced (4 Joyce on Insurance, parag. 3181), and that the trial court did not err in overruling appellant's demurrer to appellee's thirteenth plea. Therefore, the judgment will be affirmed.

Affirmed.

Louisa A. Hausler, Administratrix, Appellee, v. Commonwealth Electric Company, Appellant.

Gen. No. 13,999.

1. **EVIDENCE**—*effect of non-production.* A jury is entitled to infer that evidence not produced which a party might have produced, if produced might have been unfavorable to such party.

2. **ELECTRICITY**—*care required of those employing.* A corporation employing electric wires of high voltage in connection with its business is bound to exercise a degree of care commensurate with the danger; such a company is required properly to insulate such wires.

3. **ORDINANCE**—*duty to observe provisions of, requiring protection of electric wires.* An electric light company which accepts a franchise ordinance is bound to obey its provisions requiring insulation and protection of electric wires; its failure so to do constitutes actionable negligence in favor of a person injured in consequence.

4. **CONTRIBUTORY NEGLIGENCE**—*what not.* A person who was required in connection with his duty to handle electric light wires is not required to examine critically every part of such wires; such a person has a right to assume that the owner of such wires has performed its duty properly to insulate and protect the same.

Action in case for death caused by alleged wrongful act. Appeal from the Superior Court of Cook county; the Hon. ROBERT W.

Town of Cicero v. Hall, 144 App. 589.

under the terms of the bond of the town collector in question in this case, treated either as a statutory or as a common law obligation, that the sureties upon such bond were liable for the failure of the town collector to account for moneys reported by him as in his possession where he had deposited the same in a bank of his own choosing.

Action in debt. Appeal from the Municipal Court of Chicago; the Hon. JOHN H. HUME, Judge, presiding. Heard in this court at the March term, 1908. Affirmed. Opinion filed November 12, 1908.

Statement by the Court. This is an appeal from a judgment of the Municipal Court of Chicago in favor of the Town of Cicero and against Joseph Hall and the Metropolitan Surety Company in a case of the first class in debt. The judgment was in the penal sum of a bond sued on, the damages being assessed at \$6,329.96. The judgment was by the consideration of the court, sitting without a jury. After finding the issues for the plaintiff the court overruled a motion for a new trial and a motion in arrest of judgment, and gave judgment as above stated. From this judgment the defendants have appealed to this court and have assigned various errors. Their contention in argument is confined to the proposition that under the undisputed facts, the finding of the court was erroneous in law.

The facts out of which the suit grew and which appear in the record are these:

The defendant, Joseph Hall, was on April 4, 1906, elected Collector of the Town of Cicero in Cook county, Illinois, for a period of one year. He entered on his duties April 17, 1906, at which time he presented and the Board of Trustees of the Town of Cicero accepted and approved a bond in the penal sum of \$20,000, with himself as principal and The Metropolitan Surety Company of New York as surety thereon, conditioned as follows:

“The condition of this obligation is such, that whereas, the above bounden Joseph Hall was on the fourth day of April, A. D. 1906, duly elected to the

head conductors used by said company shall be protected by guard wires or other suitable mechanical device or devices."

"CHICAGO, 19th of Sept., 1897. To the City of Chicago, and Wm. Loeffler, Chicago City Clerk: We beg leave to advise you that the Commonwealth Electric Co. accepts the ordinance granting us certain rights and privileges, and requiring us to perform certain duties and obligations, passed by the council of said city on the 21st day of June, 1897, and again passed over the Mayor's veto on the 28th day of June, 1897, and we agree to perform said duties and obligations imposed upon us.

THE COMMONWEALTH ELECTRIC Co.,
By Wm. K. Petterson, Pres."

The accident occurred in a north and south alley, south of Sixty-sixth place, which lies east and west and is intersected or crossed by the alley. The poles north of Sixty-sixth place belonged to the Chicago Telephone Company, and only that company's wires were strung on them. South of Sixty-sixth place the poles were combination poles and were for the use of appellant and the telephone company. All the poles, both north and south of Sixty-sixth place, were on the east side of the alley, and the first combination pole south of Sixty-sixth place was at the southeast corner of Sixty-sixth place and the alley. The wires of appellant running south were strung on the west part of a cross-arm, which arm was about thirty feet from the ground. They were for the conveyance of light and power, and their voltage was 2,100 to 2,300 volts. The cross-arms on the combination poles for the use of the telephone company were four or five feet below the cross-arms supporting appellant's wires. The combination poles were about 100 feet apart, as testified by one witness, and sixty-seven or sixty-eight feet apart, as testified by another witness.

John H. Hausler, deceased, was thirty-six years of age at the time of the accident, May 3, 1902. He, with

 Town of Cicero v. Hall, 144 App. 589.

"Summary.

Total collections,		53704.29
Total commissions,	1074.09	
Shortage Failure Lincoln Bank,	6102.07	
To Louis Grisko, Treasurer,	46528.13	
		<hr/>
		53704.29 53704.29."

After testifying to the accuracy of this report Mr. Hall, who was called in this suit as a witness for the plaintiff, testified that he did not turn over to the Treasurer of the Town of Cicero the \$6,102.07 mentioned, but deposited it with the Lincoln Bank, which failed. "That is the reason", he said, "I failed to turn it over".

On account of this failure, the present suit was brought and a declaration in debt on the bond filed. The declaration assigned as a breach of the bond that Hall did not faithfully account for all moneys that came into his hands as collector and pay over the same pursuant to the provisions of law to the Supervisor (who by law is the Treasurer) of the plaintiff and did not faithfully perform the duties of his office to the best of his skill and ability.

The defendants filed a plea of *nil debet*, which was successfully demurred to, a plea of *non est factum*, on which issue was joined by a *similiter*, and the two other pleas, which were traversed with a tender of issue.

The first of these pleas was to the effect that the said Hall paid over all the moneys that came into his hands as said Collector, pursuant to the provisions of law, by the order or resolution of the Board of Trustees of the Town of Cicero, to the Lincoln Bank of Morton Park, Illinois, or to other person or persons designated by said Board, and so did faithfully account for all moneys coming into his hands as Collector. The second asserts that Joseph Hall has at all times faithfully accounted for all moneys that came into his hands as Collector of the Town of Cicero,

of the copper wire, fell dead, and Flood, to whom the deceased had halloed just before the accident, to hold the reel, also fell dead in the wagon.

E. E. GRAY, F. J. CANTY and J. C. M. CLOW, for appellant.

W. S. JOHNSON, for appellee.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

Appellant's counsel contend that the verdict is contrary to the evidence; that appellant's wires were properly insulated; that appellant was not guilty of negligence, and that the deceased was guilty of negligence which contributed to the injury. James Creeseey, Edward Wiltse and C. T. Robinson, the three linemen who, with Flood, deceased, were working under appellee's intestate at the time in question, testified that immediately after the deceased fell, they examined, from end to end, the first span of appellant's wire next south of the alley, and which extended from the pole at the southeast corner of Sixty-sixth street and the alley to the pole next south of that pole, for the purpose of ascertaining the cause of the accident; that they examined it from the ground directly underneath it.

Creeseey testified that there was a bare joint in the wire about seventy-five feet from where the deceased lay, when he fell, and about thirty feet north of the pole the deceased was trying to throw the wire onto, and that the joint was dark, like the wire itself, and appeared as if it had never been taped.

Wiltse testified that the joint was nearly forty-five to fifty feet south of the corner pole and was untaped and very dark in color. Robinson also testified to finding a bare, untaped joint in the span of wire mentioned.

There is evidence tending to prove that the joint referred to by the witnesses was about the place where

the copper wire swung by the deceased looped over appellant's live wire. Witnesses called by appellant testified, in substance, as follows:

H. M. Weber, claim agent for Chicago Telephone Co.: Went to the place of accident about eleven o'clock the day of the accident, in company with Mr. Ross and Mr. Berry, claim agent of appellant, and found a joint in the appellant's wire about thirty-three and one-half feet from the pole at corner of alley; that there was a tape connection on the electric wire, and a small piece of tape, an inch or an inch and a half, hanging from it. This taped connection was the only joint he saw. Berry testified: "There was a joint in the span near the middle, I noticed. It is what is called a taped joint, where a connection had been made, and a small piece, about an inch I should say, of tape hanging down from the north end of the joint". "All I could observe from the ground was that the joint appeared to be properly taped".

H. H. Lovell, foreman, in the construction department of the Chicago Telephone Co. in 1902, testified that he went to the place of the accident about eleven o'clock in the morning of May 3, 1902. He says: "There was apparently a joint about twenty-five feet south of this corner pole that was covered with tape. One end of that appeared to be a little unravelled, which might be due to the action of the weather, but there was no bare place that I could discover from the ground. The Commonwealth wires were insulated. I discovered no other disturbance of the insulation except at the joint, as I have stated". On cross-examination this witness testified: "There was a joint there apparently about four inches long, which had been wrapped with insulating tape, to complete the insulation on this wire, and at the north end, as I remember it, it was apparently loose, that is, loosened or ruffled up a little bit. I don't know that it was unravelled any except that it had the appearance of being ruffled up".

Wm. L. Seese, appellant's general foreman, testified that he visited the place of the accident with Mr. Riley, a clerk in his office, early Sunday morning, the next day after the accident. He says: "There was a joint in the west wire of the first span south of Sixty-sixth place. I could see, by standing on the ground and looking up, that the joint was taped. A piece of the tape about an inch long was hanging at the north end of the joint". Riley, Mr. Seese's clerk, testified substantially as did Mr. Seese.

The testimony of these witnesses is not inconsistent with the claim of appellee's counsel that the joint was not properly insulated.

A. D. Alexander, appellant's superintendent, testified that the Monday next after the accident, which happened Saturday, he sent his foreman to the place of the accident, and that a coil of wire was brought to him, which he examined, and that there was a taped joint in the wire; that he kept the wire in his office probably a month, and then sent it to appellant's general offices, 139 Adams street, and has not since seen it, and don't know where it is.

Frank Brugaman, A. L. Newcomb and James B. Murdock, who were in appellant's employ at the time of the accident, were sent to cut out the span of wire in question. Brugaman testified that the wire was the first span of wire south of Sixty-sixth place, and that he saw it after it was cut down; that there was a joint in it, which was taped, that he did not remember that there was any tape hanging from the joint, but there was a small hole burned in the tape. He also testified that he took the wire to Mr. Alexander's office, also took it to the coroner's inquest, and after the inquest took it back to Mr. Alexander's office, left it there and never saw it again.

Wakefield testified that he went up the corner pole and Murdock went up the next pole south, and that they put up a new wire and cut the other one down. He says the joint in the wire was taped, but had been

jammed or moved and pulled off at one end of the joint, and that, with the exception of the little spot at the north end of the joint, it was taped; that Mr. Brugaman took the wire away and he, witness, had not since seen it.

A. L. Newcomb, the foreman of the men who cut out the span of wire, testified: "The wire was insulated and was in fairly good condition. There was a joint in it which was taped. There was a burned speck in the tape at one end of the joint. With that exception, the insulation was complete".

The evidence of these witnesses plainly indicates that the insulation of the joint was defective. The cutting out of the old span of wire and putting in a new span could only have been for one of two reasons—either because the old span was so defective as to render its removal necessary, or because it was desired to preserve it as evidence in the event of a suit. That a suit was anticipated is evident from the testimony of Carl A. Ross, a clerk in the office of Holt, Wheeler & Sidley, attorneys for the Chicago Telephone Co. He testified that, on or about May 3, 1902, he went to the place of the accident and examined the span of wire in question. The wire was not produced on the trial nor was its non-production satisfactorily accounted for. Berry, appellant's claim agent, testified that he made a search for it and could not find it, but failed to state where he searched or how much of a search he made. His was the only evidence of any search. In the case of a written instrument claimed to have been lost such evidence would not be a sufficient basis for secondary evidence. The coil of wire would have been competent and important evidence, on proof that it was in the same condition as it was at the time of the accident, and the jury had the right, as we think, to infer that if produced it would be unfavorable to appellant's defense. There is no direct positive testimony of any witness that the copper wire, which was being strung, came in contact with the joint

in appellant's wire; but we think it legitimately inferable from the evidence that it did. However, it is not essential to appellee's recovery that such contact should be proved, as the declaration charges generally defective and insufficient insulation of appellant's wires. The jury were confronted with these pregnant facts: appellee's intestate was dead; his death was caused by a powerful current of electricity passing from appellant's wire to the wire the end of which the deceased held in his hand and this could not have happened had appellant's wire been properly insulated. It was appellant's duty, independently of any express obligation, to exercise care commensurate with the danger, and the danger in the case of wires of such high voltage as appellant's wires is very great. *Alton Ry. & Illuminating Co. v. Foulds, Admr.*, 190 Ill. 367.

It was appellant's duty not only to properly insulate its wires, but to maintain such insulation. *Hebert v. Lake Charles etc. Co.*, 64 Lawyer's Rep. Ann. 106, La.

The ordinance of the city and its acceptance by appellant constitute a contract between appellant and the city, and by that contract appellant bound itself to properly insulate all its wires, and protect them "by guard wires or other suitable mechanical devices". It did neither of these things. The evidence is uncontradicted that appellant's wires were not guarded in any way. Appellant took the license of the city *cum onere*, and while it has availed of the benefits, it has failed to perform the corresponding obligations. Appellant, in thus failing, was guilty of negligence. *Commonwealth Electric Co. v. Rose*, 214 Ill. 545.

The alley south of Sixty-sixth place is a public alley, and the poles there are combination poles, for the use of appellant and the Chicago Telephone Company, and appellant must be held to have anticipated that the public would use the alley, and that the telephone company would use the poles in proximity to appellant's wires, in attending to their duties. This independ-

Hausler v. Commonwealth Electric Co., 144 App. 643.

ently of any contract obligation. *Rowe v. Taylorville Elec. Co.*, 213 Ill. 318, 322-3.

The contention of appellant's counsel that the verdict is contrary to the weight of the evidence, on the question of appellant's negligence, cannot be sustained. Counsel for appellant argue that the deceased was guilty of negligence which contributed to the injury, in flipping the wire instead of climbing the pole and placing it on the cross-arm; and in not examining appellant's wire before attempting to place the telephone wire on the cross-arm; and in standing on wet or damp ground, which is a conductor, while swinging the wire. The evidence shows that the span of wire in question, with the exception of the joint, appeared to be insulated; that the defect in the insulation of the joint could only be observed by one standing directly beneath it and critically observing it, and that it was dark and of about the same color as the other wire in the span. It was not the duty of the deceased to examine critically every part of the wire before proceeding with his work. He had the right to assume that appellant had performed its duty to properly insulate every part of its wire, and to maintain such insulation. The duty of constant supervision and necessary inspection was appellant's duty. It was abundantly proved that the ground on which the deceased stood was not wet, but was dry. The question whether the deceased exercised ordinary care was fully presented to the jury, by instructions given at appellant's request, and we are satisfied with the verdict of the jury, which necessarily includes a finding that he did.

The judgment will be affirmed.

Affirmed.

**Philadelphia Savings Fund Society, Appellant, v.
Charles W. Lasher et al., Appellees.**

Gen. No. 13,981.

1. **MORTGAGES**—*character of, given by wife to secure husband's debt.* A wife who gives a mortgage to secure her husband's debt is bound as a principal.

2. **ELECTION**—*when may be rescinded even as against surety.* The holder of a mortgage security may rescind an election to declare the principal sum due and dismiss a bill to foreclose even as to a surety where the mortgage specifically provides for the right of rescission.

Foreclosure. Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1907. Affirmed in part, reversed in part and remanded with directions. Opinion filed November 12, 1908. Rehearing denied November 30, 1908.

MASON BROTHERS, for appellant.

LESLIE A. NEEDHAM, for appellees.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

June 22, 1905, appellant filed a bill against Charles W. Lasher and his wife, Jane E. Lasher, which was subsequently amended by making Charles W. Moeller a defendant, and in other particulars. The bill is to foreclose two mortgages executed to appellant by appellees, Charles W. Lasher and Jane E. Lasher, to secure payment of a promissory note of Charles W. Lasher of date April 11, 1903, for the sum of \$35,000, with interest at the rate of five per cent., payable semi-annually on the 11th day of October and in April in each year, till the principal sum should be fully paid, the instalments of interest being evidenced by coupon notes. One of the mortgages sought to be foreclosed is of the same date as the notes, April 11, 1903, and conveys to appellant lots 1 to 4, both inclusive, in block 18 in Butler, Wright & Webster's addition to

assigned, except as the covenant in the chattel mortgage worked an assignment of it to defendant. There was no other assignment made by Kelly to defendant and no pretense of an assignment to Merslak. Neither Kelly nor Merslak were produced as witnesses by defendant to explain, if explanation were possible, their relations to defendant in an effort to show that they were contrary or different from that arising from the admitted dealings of defendant with plaintiff and the leased premises. There is nothing in the proofs from which an inference should be indulged that either Kelly or Merslak were hostile to defendant. The matters alleged by defendant were in the nature of defenses to plaintiff's claim, the burden of sustaining which rested upon defendant. The admission of Meyer that defendant was good for the rent was made at a time when its liability therefor was asserted and his admission must be construed with that fact in mind. He made it as the representative of defendant in a matter impliedly entrusted to him as its manager, in the usual course of defendant's business.

Whether the assignment of the lease under the conditions of the Kelly chattel mortgage followed by the continued possession of the lease, otherwise unassigned, was sufficient to fasten upon defendant liability to pay the rent reserved by the lease without the taking of possession of the demised premises, is not of the essence of the right of plaintiff to maintain this judgment, in view of the fact that defendant did take possession through Merslak and did pay rent in accordance with the terms of the lease. While at common law and under the decisions of the English courts, an assignee in virtue of a mortgage would be liable to pay rent to the lessor in the assigned lease, regardless of the fact of actual entry having been made into the demised premises, or possession thereof taken, yet that doctrine has been somewhat relaxed in this country, for while the mortgagee is out of possession the mortgagor for every substantial purpose

terest thereon from April 11, 1903, and \$31,000 of the principal sum on or before April 11, 1908, with interest thereon until paid at five per cent. per annum, payable semi-annually on the first days of April and October.

May 28, 1904, appellant filed a bill to foreclose the mortgages for default in the payment of interest and \$1,000 principal payable April 11, 1904. June 1, 1904, suit was dismissed by appellant, the amount in default having been paid.

The present bill, filed June 22, 1905, avers that there is due to appellant \$34,000, with interest thereon at five per cent. from April 11, 1905, and \$850, with interest at seven per cent. from April 11, 1905, and \$1,750 as solicitor's fees.

The issues having been made up, the cause was referred to a master, who reported favorably for appellant and found and recommended as follows: "I find, therefore, that all the material allegations of the complainant's bill of complaint are proven and true, and recommend that the prayer of said bill for the foreclosure of said mortgages for the sum of \$39,899.60 be granted".

Appellees, Charles W. Lasher and Charles W. Moeller, filed objections to the master's report, which by the decree were ordered to stand as exceptions. No objections or exceptions were filed by Mrs. Lasher. March 23, 1907, the court rendered a decree sustaining the exceptions of Charles W. Lasher and Moeller as to lots 18 to 21, both inclusive, being the Dearborn avenue property above mentioned, and overruling said exceptions as to lots 1 to 4, both inclusive, being the Chicago avenue property above mentioned, and approving the master's report as to the Chicago avenue property and disapproving it as to the Dearborn avenue property, and finding that there was due to complainant the sum of \$37,689.60, with legal interest from November 22, 1906, the date of the master's report; also \$1,750 found due by said report as a rea-

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sonable solicitor's fee, under the provisions of the instruments sued on. The court dismissed the bill for want of equity as to the Dearborn avenue property and decreed a foreclosure of the mortgage of the Chicago avenue property.

The appellant has assigned errors and appellee, Charles W. Moeller, has assigned cross-errors.

Charles W. Lasher was the owner of the Chicago avenue property April 11, 1893, the date of the execution of the mortgage by him and his wife of that property. Subsequently, June 10, 1901, he purchased the property at a foreclosure sale, subject to the lien of appellant acquired by the mortgage of April 11, 1903, and a certificate of purchase was issued to him, which certificate he assigned to Jane E. Lasher December 15, 1905. The assignment is expressed to be "for value received". December 16, 1903, the master executed a deed to Jane E. Lasher, as assignee of the certificate of purchase, which deed contains the following: "Subject, however, to the lien of the principal note and all unpaid coupon notes secured by the mortgage set out in said bill, and whatever sum or sums of money may be due and payable, or may hereafter become due and payable, under the terms and provisions of said mortgage, to the respective holder or holders of said note and remaining interest notes". The bill for foreclosure, under the decree on which the foreclosure sale was had, was filed by Charles W. Lasher against Howard Copeland et al., and the bill sets forth Lasher's indebtedness to appellant and that he executed the mortgage of April 11, 1893, as security for the same. July 20, 1903, when the mortgage of the Dearborn avenue property was executed, Jane E. Lasher was the owner of that property. She became such owner March 28, 1901. Charles W. Lasher and Jane E. Lasher executed to appellee Moeller two quitclaim deeds, each dated June 22, 1905, one of their interest in the Chicago avenue property and the other of their interest in the Dearborn avenue property, the

expressed consideration in each deed being one dollar. It was admitted by counsel for Charles W. Moeller, appellee, in open court, that Moeller took said deeds *pendente lite*, and had no interest in the quit-claimed premises beyond that owned by the grantors. Therefore, Moeller stands in the shoes of his grantors in this suit. Counsel for appellee Moeller frankly admits that in December, 1903, the two mortgages were liens on the two properties and so continued till the transaction of May 28th, to June 14, 1904; but contends that Mrs. Lasher was, May 28, 1904, the owner of both the properties, and that, in executing the Dearborn avenue mortgage, she became surety for her husband's indebtedness, and that, as such surety, she was entitled to notice of appellant's revocation of its election of May 28, 1904, to declare the whole indebtedness due for default in payment. For greater certainty as to the exact contention of counsel, we quote the following under heading "C" in his brief of points:

"By the terms of the mortgages, appellant possessed the right, first, on default without notice, to declare the indebtedness at once due. Second, to revoke such election and receive any portion of principal or interest. Third, appellant's rights thereupon to be as though no election and revocation had been made. But appellant had no right to revoke its election of May 28, 1904, without notice to the surety, or to file a bill and incur costs, or to receive payment other than principal and interest".

Mrs. Lasher executed both mortgages and next following the provision in each mortgage giving to the legal holder of the secured note the option of declaring the whole indebtedness due, are the following provisions:

"And after the exercise of such option such legal holder may elect to revoke the same, and may receive any portion of said indebtedness hereby secured, and the rights of said party of the second part hereunder shall thereafter remain in full force *and be the same*

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as to the remainder of such indebtedness as if such option had not been exercised; and such legal holder shall have the right to exercise such option and revoke the same in like manner from time to time, in case of any such default or breach aforesaid, the rights of said party of the second part remaining the same after any such revocation as if such option had not been exercised''.

Therefore, when appellant revoked its election of May 28, 1904, to declare the whole indebtedness due, and dismissed its bill filed at that date, it was, by the very terms of the contract, in the same position as it would have been had such election not been made, namely, to again, from time to time, declare the whole indebtedness due, without notice, and to revoke such elections from time to time.

Benneson v. Savage, 130 Ill. 352, was a suit for the foreclosure of a trust deed. One ground of defense set up by plaintiffs in error, against whom the decree ran, was that the property in question was their property, and that, by virtue of the trust deed they were sureties for the indebtedness described therein, and that the trust deed was released without their consent. The court held against the contention, saying, among other things: "It is next objected that the mortgage was released by reason of the extension of the time of the payment of the debt without the consent of the mortgagors, Elvey W. Savage and Anna Wells, who were the real owners of the mortgaged property. The mortgage expressly recites, as was seen *supra*, that it is provided in the note which it secures, 'that the holder thereof may extend the time for the payment of the whole or of any part thereof, on the maker executing coupons for interest to accrue thereon during such extension'." In the present case express consent is given in plain, unambiguous terms, by the mortgages. In the written agreement of extension of the time of payment, of date July 20, 1903, between appellant and Charles W. Lasher, it is recited: "And whereas the said one principal note has become due

and is now owned and held by the society, and said Charles W. Lasher and wife have requested of said society an extension of the time of payment thereof; Now", etc.

Under date of July 30, 1903, the 10th day after the extension agreement of July 20th was executed, Mr. and Mrs. Lasher addressed to Mason Brothers, then solicitors for appellant, the following letter:

"GENTLEMEN: Learning from you that in the extension agreement, dated July 20, 1903, and in the mortgage of even date therewith, both relating to \$35,000 loan from The Philadelphia Saving Fund Society to Charles W. Lasher, there is a clerical error, stating that a certain mortgage originally and still securing said \$35,000 loan, was recorded April 15, 1893, whereas the actual date of recording was April 14, 1893, we hereby authorize correction to be made accordingly in said extension agreement and mortgage dated July 20, 1903, as fully and to all intents and purposes as though such correction had been made prior to the execution of said last mentioned agreement and mortgage, respectively.

Yours truly,

CHARLES W. LASHER,
JANE E. LASHER".

It is clear from this letter that Mrs. Lasher knew of the July 20th extension agreement and approved it, except as to the mistaken dates, which being true she is not in a position to complain of the revocation of the election of May 28, 1904, by the dismissal June 14, 1904, of the bill filed at the former date. Mrs. Lasher testified that she remembered of one extension and approved it. She also testified that she did not authorize an extension of the loan in 1904, which may mean that outside the mortgages she gave no express authority to extend it; but the evidence tends strongly to prove her husband acted as her agent in agreeing to the extensions and in respect to the property mortgaged. She testified that she expected her husband to attend to the loan, and that after the

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mortgage was made she left everything relating to the loan and the indebtedness and mortgage in Mr. Lasher's hands. She further testified that she was consulted by Mr. Lasher in matters of importance. Asked whether she was consulted with regard to the last written extension, she answered, "I don't know whether there was ever more than one. You say the last extension; I don't know just—I only remember one".

"Q. You were consulted as to that one, were you?

A. Yes.

Q. And you approved of that, did you not?

A. Yes, sir".

The evidence shows that leases of the properties were executed by Charles W. Lasher in his wife's name, by him as her attorney, and that he signed receipts for the rents, sometimes in his own name and sometimes in her's, as her attorney, and Mrs. Lasher testified that she never personally paid any taxes on the property, or any interest, and she supposed that Mr. Lasher paid the interest and taxes out of the rentals. We are of opinion, as between Mrs. Lasher and appellant, she is not to be regarded as a surety, but as a principal.

In Jones on Mortgages, 6th ed., vol 4, sec. 114, the author says that in states in which a married woman is capable of binding her separate property by contract, "she is bound as principal when she makes a mortgage to secure her husband's debts, and her liability is not affected by any understanding she may have with her husband, or by giving additional security as collateral to the mortgage"; citing Alexander v. Bouton, 55 Cal. 15, which case we have examined and find that it fully supports the text. By the law of this State the mortgages in question are as effective as against Mrs. Lasher as if she had been a *feme sole* when she executed them. Hurd's Rev. Stats. 1905, chap. 30, sec. 18, p. 466. But even though it should be held that Mrs. Lasher was a surety, this would

not operate to discharge the lien of the mortgage of the Dearborn avenue property, because in view of the terms of that mortgage appellant had the right to revoke the election of May 28, 1904, without notice.

The bill filed May 28, 1904, was dismissed in pursuance of an arrangement between appellant's solicitors and Charles W. Lasher and his attorney, Mr. Ulysses G. Hayden, on the payment by Mr. Lasher of the amount of principal and interest then due, and \$500 in addition. Mr. Lasher, in his examination in chief, calls the \$500 a bonus. On cross-examination he said he did not know how Mason Bros. applied the \$500, or what they called it. Both Henry B. and Henry D. Mason testified that the \$500 was paid as solicitor's fees for services performed in the suit which was dismissed, and that Mr. Hayden, whom Lasher had previously introduced to Mason Bros. as his attorney, paid the aggregate of the sums agreed on, including the \$500, and that they receipted for the items paid. We think the preponderance of the evidence is that the \$500 was paid by Mr. Lasher as a solicitor's fee for services in the former suit. With respect to this payment appellant's counsel objects that by the mortgages a solicitor's fee can only be allowed in case of a decree, and that the acceptance of payment was in violation of the rights of Mrs. Lasher, inasmuch as it leaves her liable to the same extent as if the payment had not been made. While it is true that by each of the mortgages there is no provision for the allowance of solicitor's fees, except by decree, it certainly does not follow that the payment by Mr. Lasher is necessarily prejudicial to Mrs. Lasher. *Non constat* that Mr. Lasher did not make the payment with his own money. That he so did must be presumed in the absence of evidence to the contrary. It is not included in the master's estimate of the amount due to appellant, or in the court's finding of the amount due, and so is not charged against the mortgaged premises. The foregoing includes all proposi-

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tions argued by counsel for appellee Moeller, and propositions not argued must be deemed waived. Our opinion is that the dismissal of appellant's bill for want of equity, as to the Dearborn avenue property, namely, lots 18, 19, 20 and 21 in John S. Bussing's subdivision of block 10 in Wolcott's addition to Chicago in the county of Cook and state of Illinois, is error, and the court should have decreed the foreclosure of both mortgages.

No assignment or cross-assignment of error questions the correctness of the court's finding of the amount due, which is the amount found due by the master, nor the allowance by the court of \$1,750 as a reasonable solicitor's fee; nor is it claimed by counsel for either party that such finding or allowance is incorrect or improper. That part of the decree dismissing the bill for want of equity as to the Dearborn avenue property, above described, will be reversed and the decree as to the Chicago avenue property, and in all other respects, will be affirmed, and the cause will be remanded with direction to enter a decree in conformity with this opinion. The appellant to recover its costs of this court and the Circuit Court.

Affirmed in part and reversed in part and remanded with directions.

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Complaint is made about the evidence in relation to expense for necessary medical attendance. Dr. Robertson testified that his services to plaintiff were worth \$200, but there is lacking any evidence that plaintiff either paid this or obligated himself to do so. This is not the legal test. In *Chicago & Erie R. R. Co. v. Cleminger*, 178 Ill. 536, it was held that the true test was whether a liability had been incurred to pay for the medical services. From the undisputed evidence of Dr. Robertson it is very plain that plaintiff incurred a liability to pay Dr. Robertson the amount the service rendered him was worth.

We have examined the evidence and rulings of the trial court thereon, about which defendant complains, and do not discover any reversible error in either the

admission or rejection of such evidence. The question asked Miss Tully concerning the speed of the car and her answer that "there was no change in speed", is of no importance as affecting the merits or the ultimate result, even conceding, as claimed by counsel, that the question asked was suggestive of the answer given.

Dr. Robertson was the attending physician, and it was permissible for him to testify concerning his knowledge, acquired as such attending physician, of plaintiff's suffering pain from the injury to his ear. These are said to be self-serving statements and as such inadmissible, and *Chicago City Ry. Co. v. Mauger*, 128 Ill. App. 512, and other cases to a like import are cited as authorities sustaining such contention. What was said in the cases cited had reference to physicians testifying as experts from examinations made of the injured party with the express purpose in view of qualifying to give testimony upon the trial. Were Dr. Robertson an expert witness and not the attending physician, the point would be well taken. But a different rule obtains in the case of an attending physician. This was stated in *W. C. St. Ry. Co. v. Carr*, 170 Ill. 478, in these words: "We think, however, the correct rule to be deduced from that laid down by *Greenleaf* and most conducive to justice, is that such declarations, being in favor of the party making them, are only competent when made as part of the *res gestae*, or to a physician during treatment. * * * This view is in harmony with what we said in the *Illinois Central Railway Company v. Sutton*, 42 Ill. 438".

The watch-ticking test made by Dr. Robertson in an endeavor to test the hearing of plaintiff did not transgress the rules of evidence, nor did the testimony of Dr. Robertson describing the method pursued infringe any like rule. His statement was in effect as to what distance plaintiff indicated he could hear the watch tick, and in no sense an opinion of the witness as to whether he could hear the ticking of the watch at any particular distance. The attending-physician rule is

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in values occurring subsequent to the execution of the mortgage. *Furlong v. Cox*, 77 Ill. 293; *Roy v. Goings*, 96 Ill. 361; *Slingo v. Steele Wedeles Co.*, 82 Ill. App. 139.

The contention that averments of such facts were not essential because appellee was a mortgagee in possession at the time of filing the bill is without force. He appealed to a court of conscience and it behooved him to establish that he had proceeded equitably in all he had done in the matter of his claim.

The power to appoint receivers is the prerogative of a court of equity, but that power is subordinate to legislative action, wherever a statute exists in any wise limiting or defining the power. It is seldom exercised in cases where other legal remedies are adequate to protect the moving parties' rights. Nor will a party to the action be appointed, except upon an agreement of the parties in interest, and seldom, if ever, against their protest. *Benneson v. Bill*, 62 Ill. 410.

A receiver should be an impartial and indifferent person. *High on Receivers*, sec. 63.

Neither a party to a suit nor a trustee, whose business it is to watch a receiver, should be appointed. *Kerr on Receivers*, 126. The interests of all parties, however, should be considered, so that these rules are not without exceptions. *Taylor v. Life Association of America*, 3 Fed. R. 465.

The appointment of receivers is in some respects controlled, as applied to the case at bar, by the statute. See Session Laws of 1903, title Receivers. By section 2 the chancellor may, in his discretion, in lieu of appointing a receiver, permit the party in possession to retain such possession on giving bond. The appointment in this case was the appointment of appellee as receiver, and therefore not under the section of the statute *supra*. Section 1 of the Act *supra* provides "that before any receiver shall be appointed, the party making the application shall give bond to the adverse party in such penalty as the court or judge

may order, and with security to be approved by the court or judge, conditioned to pay * * * provided that bond need not be required when for good cause shown and upon notice and full hearing, the court is of opinion that a receiver ought to be appointed without such bond." The record fails to disclose that the applicant gave the bond required by the foregoing section. Neither can we find from the record that the court upon notice and a full hearing was of the opinion that the bond called for by the statute should be dispensed with. The record conveys no intimation of the opinion of the court upon this subject. To entitle appellee to the appointment of a receiver, he must as a *sine qua non* to the enforcement of that right give the bond required by the statute, unless it is the opinion of the court that a receiver ought to be appointed without bond, and then the court's opinion must affirmatively appear in the order making the appointment. The statutory requirement in this regard cannot be dispensed with. It was evidently enacted for the purpose of making liable the moving party in a receivership proceeding, for such damages as might result from the improvidence of his act in bringing about a receivership where none should have been asked.

The order allowing compensation to appellee as receiver of all the profits he might make in operating the restaurant, with the mortgaged property, is so indefinite in its ultimate operation as to be erroneous. All appellee was entitled to receive was the amount due him on his debt. When this was accomplished, in whatever way, appellant, the mortgagor, was entitled to receive, upon demand, the mortgaged chattels. Appellee seems to have proceeded upon the assumption that but little or no profit would result from the operation of the restaurant. This assumption we cannot adopt, in the absence of proof. Neither can we assume that appellee would desire to run the restaurant unless there was a reasonable expectation of profit to be realized from so doing. If appellee was entitled to

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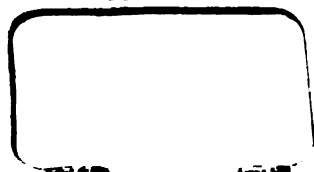
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HARVARD LAW LIBRARY



Hausler v. Commonwealth Electric Co., 144 App. 643.

WRIGHT, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed November 12, 1908.

Statement by the Court. Appellee's intestate, John H. Hausler, was killed by a shock of electricity, between nine and ten o'clock in the morning of May 3, 1902, leaving him surviving the appellee, his widow, and four children, aged respectively, ten years, seven years, five years and one year. Appellee sued appellant, claiming that the death of her intestate was caused by its negligence. The jury found for appellee and assessed her damages at the sum of \$3,000, and the court, after overruling appellant's motions for a new trial and in arrest of judgment, rendered judgment on the verdict. From this judgment appellant has appealed. No question is raised as to the sufficiency of the declaration, to which the appellant pleaded the general issue. The declaration charges insufficient insulation of appellant's wires, and also that appellant did not guard its wires as required by an ordinance of the city of Chicago. The ordinance and its acceptance by appellant are as follows:

"Be it ordained by the City Council of the City of Chicago: Sec. 1: Subject to the terms and conditions of this Ordinance, there is hereby granted to the Commonwealth Electric Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, the right to construct, maintain and operate a plant or plants, and in connection therewith to construct, repair, maintain, operate and use in, through, upon, over and under the streets, avenues, alleys, sidewalks, public ways, tunnels and upon viaducts and under the Chicago river and its various branches within the City of Chicago, a line or lines of wires or other electrical conductors to be used for the production, transmission and distribution of electricity for the purposes of furnishing light, heat and power, and the transmission of sound and signals, or any or either of them.

"Sec. 6. All conductors and wires owned and operated by the said company under the provisions of this ordinance shall be properly insulated and all over-

head conductors used by said company shall be protected by guard wires or other suitable mechanical device or devices."

"CHICAGO, 19th of Sept., 1897. To the City of Chicago, and Wm. Loeffler, Chicago City Clerk: We beg leave to advise you that the Commonwealth Electric Co. accepts the ordinance granting us certain rights and privileges, and requiring us to perform certain duties and obligations, passed by the council of said city on the 21st day of June, 1897, and again passed over the Mayor's veto on the 28th day of June, 1897, and we agree to perform said duties and obligations imposed upon us.

THE COMMONWEALTH ELECTRIC Co.;
By Wm. K. Petterson, Pres."

The accident occurred in a north and south alley, south of Sixty-sixth place, which lies east and west and is intersected or crossed by the alley. The poles north of Sixty-sixth place belonged to the Chicago Telephone Company, and only that company's wires were strung on them. South of Sixty-sixth place the poles were combination poles and were for the use of appellant and the telephone company. All the poles, both north and south of Sixty-sixth place, were on the east side of the alley, and the first combination pole south of Sixty-sixth place was at the southeast corner of Sixty-sixth place and the alley. The wires of appellant running south were strung on the west part of a cross-arm, which arm was about thirty feet from the ground. They were for the conveyance of light and power, and their voltage was 2,100 to 2,300 volts. The cross-arms on the combination poles for the use of the telephone company were four or five feet below the cross-arms supporting appellant's wires. The combination poles were about 100 feet apart, as testified by one witness, and sixty-seven or sixty-eight feet apart, as testified by another witness.

John H. Hausler, deceased, was thirty-six years of age at the time of the accident, May 3, 1902. He, with

James Creese, C. T. Robinson, Edward Wiltse and James Flood, linemen and employes of the telephone company, went to the alley to string wires on the combination poles. The deceased was foreman over the other men and of large experience in the business in which he was engaged. The wire to be strung was copper wire and was on a reel in a wagon situated north of the first pole in the alley north of Sixty-sixth place. Flood was in the wagon and his duty was to give out the wire from the reel as it should be needed for placing it on the cross-arms. Some of the wire was unreel and a handline attached to it, and by direction of the deceased Robinson climbed the first pole north of Sixty-sixth place, on which only the telephone wires were strung, taking the handline with him. He then drew the wire up, unfastened the handline and passed the wire over the cross-arm and down to the ground. The deceased then took the end of the wire south with him, and when he was about twenty-five feet south of the pole at the southeast corner of Sixty-sixth place and the alley, and which was the first combination pole on the south side of Sixty-sixth place, he swung the wire on the lower cross-arm of that pole. He then walked south in the alley from that pole, taking the wire with him, and when about 140 feet distant from the pole at the corner of Sixty-sixth place and the alley, he faced north and attempted to swing the wire onto the lower cross-arm of the second combination pole south of the alley. The wire, when swung instead of lighting on the cross-arm crossed over one of appellant's wires so that a loop about two feet in depth hung down on the east side of appellant's wire. The evidence tends to prove that appellant's wire sagged in the middle of the span, so that it would be about eighteen inches or two feet distant from the telephone wire, if the latter were on the lower cross-arm and taut. When the copper wire came in contact with appellant's wire and formed a loop, as stated, the deceased, who was holding the end

of the copper wire, fell dead, and Flood, to whom the deceased had halloed just before the accident, to hold the reel, also fell dead in the wagon.

E. E. GRAY, F. J. CANTY and J. C. M. CLOW, for appellant.

W. S. JOHNSON, for appellee.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

Appellant's counsel contend that the verdict is contrary to the evidence; that appellant's wires were properly insulated; that appellant was not guilty of negligence, and that the deceased was guilty of negligence which contributed to the injury. James Creesey, Edward Wiltse and C. T. Robinson, the three linemen who, with Flood, deceased, were working under appellee's intestate at the time in question, testified that immediately after the deceased fell, they examined, from end to end, the first span of appellant's wire next south of the alley, and which extended from the pole at the southeast corner of Sixty-sixth street and the alley to the pole next south of that pole, for the purpose of ascertaining the cause of the accident; that they examined it from the ground directly underneath it.

Creesey testified that there was a bare joint in the wire about seventy-five feet from where the deceased lay, when he fell, and about thirty feet north of the pole the deceased was trying to throw the wire onto, and that the joint was dark, like the wire itself, and appeared as if it had never been taped.

Wiltse testified that the joint was nearly forty-five to fifty feet south of the corner pole and was untaped and very dark in color. Robinson also testified to finding a bare, untaped joint in the span of wire mentioned.

There is evidence tending to prove that the joint referred to by the witnesses was about the place where

the copper wire swung by the deceased looped over appellant's live wire. Witnesses called by appellant testified, in substance, as follows:

H. M. Weber, claim agent for Chicago Telephone Co.: Went to the place of accident about eleven o'clock the day of the accident, in company with Mr. Ross and Mr. Berry, claim agent of appellant, and found a joint in the appellant's wire about thirty-three and one-half feet from the pole at corner of alley; that there was a tape connection on the electric wire, and a small piece of tape, an inch or an inch and a half, hanging from it. This taped connection was the only joint he saw. Berry testified: "There was a joint in the span near the middle, I noticed. It is what is called a taped joint, where a connection had been made, and a small piece, about an inch I should say, of tape hanging down from the north end of the joint". "All I could observe from the ground was that the joint appeared to be properly taped".

H. H. Lovell, foreman, in the construction department of the Chicago Telephone Co. in 1902, testified that he went to the place of the accident about eleven o'clock in the morning of May 3, 1902. He says: "There was apparently a joint about twenty-five feet south of this corner pole that was covered with tape. One end of that appeared to be a little unravelled, which might be due to the action of the weather, but there was no bare place that I could discover from the ground. The Commonwealth wires were insulated. I discovered no other disturbance of the insulation except at the joint, as I have stated". On cross-examination this witness testified: "There was a joint there apparently about four inches long, which had been wrapped with insulating tape, to complete the insulation on this wire, and at the north end, as I remember it, it was apparently loose, that is, loosened or ruffled up a little bit. I don't know that it was unravelled any except that it had the appearance of being ruffled up".

Wm. L. Seese, appellant's general foreman, testified that he visited the place of the accident with Mr. Riley, a clerk in his office, early Sunday morning, the next day after the accident. He says: "There was a joint in the west wire of the first span south of Sixty-sixth place. I could see, by standing on the ground and looking up, that the joint was taped. A piece of the tape about an inch long was hanging at the north end of the joint". Riley, Mr. Seese's clerk, testified substantially as did Mr. Seese.

The testimony of these witnesses is not inconsistent with the claim of appellee's counsel that the joint was not properly insulated.

A. D. Alexander, appellant's superintendent, testified that the Monday next after the accident, which happened Saturday, he sent his foreman to the place of the accident, and that a coil of wire was brought to him, which he examined, and that there was a taped joint in the wire; that he kept the wire in his office probably a month, and then sent it to appellant's general offices, 139 Adams street, and has not since seen it, and don't know where it is.

Frank Brugaman, A. L. Newcomb and James B. Murdock, who were in appellant's employ at the time of the accident, were sent to cut out the span of wire in question. Brugaman testified that the wire was the first span of wire south of Sixty-sixth place, and that he saw it after it was cut down; that there was a joint in it, which was taped, that he did not remember that there was any tape hanging from the joint, but there was a small hole burned in the tape. He also testified that he took the wire to Mr. Alexander's office, also took it to the coroner's inquest, and after the inquest took it back to Mr. Alexander's office, left it there and never saw it again.

Wakefield testified that he went up the corner pole and Murdock went up the next pole south, and that they put up a new wire and cut the other one down. He says the joint in the wire was taped, but had been

jammed or moved and pulled off at one end of the joint, and that, with the exception of the little spot at the north end of the joint, it was taped; that Mr. Brugaman took the wire away and he, witness, had not since seen it.

A. L. Newcomb, the foreman of the men who cut out the span of wire, testified: "The wire was insulated and was in fairly good condition. There was a joint in it which was taped. There was a burned speck in the tape at one end of the joint. With that exception, the insulation was complete".

The evidence of these witnesses plainly indicates that the insulation of the joint was defective. The cutting out of the old span of wire and putting in a new span could only have been for one of two reasons—either because the old span was so defective as to render its removal necessary, or because it was desired to preserve it as evidence in the event of a suit. That a suit was anticipated is evident from the testimony of Carl A. Ross, a clerk in the office of Holt, Wheeler & Sidley, attorneys for the Chicago Telephone Co. He testified that, on or about May 3, 1902, he went to the place of the accident and examined the span of wire in question. The wire was not produced on the trial nor was its non-production satisfactorily accounted for. Berry, appellant's claim agent, testified that he made a search for it and could not find it, but failed to state where he searched or how much of a search he made. His was the only evidence of any search. In the case of a written instrument claimed to have been lost such evidence would not be a sufficient basis for secondary evidence. The coil of wire would have been competent and important evidence, on proof that it was in the same condition as it was at the time of the accident, and the jury had the right, as we think, to infer that if produced it would be unfavorable to appellant's defense. There is no direct positive testimony of any witness that the copper wire, which was being strung, came in contact with the joint

in appellant's wire; but we think it legitimately inferable from the evidence that it did. However, it is not essential to appellee's recovery that such contact should be proved, as the declaration charges generally defective and insufficient insulation of appellant's wires. The jury were confronted with these pregnant facts: appellee's intestate was dead; his death was caused by a powerful current of electricity passing from appellant's wire to the wire the end of which the deceased held in his hand and this could not have happened had appellant's wire been properly insulated. It was appellant's duty, independently of any express obligation, to exercise care commensurate with the danger, and the danger in the case of wires of such high voltage as appellant's wires is very great. *Alton Ry. & Illuminating Co. v. Foulds*, Admr., 190 Ill. 367.

It was appellant's duty not only to properly insulate its wires, but to maintain such insulation. *Hebert v. Lake Charles etc. Co.*, 64 Lawyer's Rep. Ann. 106, La.

The ordinance of the city and its acceptance by appellant constitute a contract between appellant and the city, and by that contract appellant bound itself to properly insulate all its wires, and protect them "by guard wires or other suitable mechanical devices". It did neither of these things. The evidence is uncontradicted that appellant's wires were not guarded in any way. Appellant took the license of the city *cum onere*, and while it has availed of the benefits, it has failed to perform the corresponding obligations. Appellant, in thus failing, was guilty of negligence. *Commonwealth Electric Co. v. Rose*, 214 Ill. 545.

The alley south of Sixty-sixth place is a public alley, and the poles there are combination poles, for the use of appellant and the Chicago Telephone Company, and appellant must be held to have anticipated that the public would use the alley, and that the telephone company would use the poles in proximity to appellant's wires, in attending to their duties. This independ-

ently of any contract obligation. *Rowe v. Taylorville Elec. Co.*, 213 Ill. 318, 322-3.

The contention of appellant's counsel that the verdict is contrary to the weight of the evidence, on the question of appellant's negligence, cannot be sustained. Counsel for appellant argue that the deceased was guilty of negligence which contributed to the injury, in flipping the wire instead of climbing the pole and placing it on the cross-arm; and in not examining appellant's wire before attempting to place the telephone wire on the cross-arm; and in standing on wet or damp ground, which is a conductor, while swinging the wire. The evidence shows that the span of wire in question, with the exception of the joint, appeared to be insulated; that the defect in the insulation of the joint could only be observed by one standing directly beneath it and critically observing it, and that it was dark and of about the same color as the other wire in the span. It was not the duty of the deceased to examine critically every part of the wire before proceeding with his work. He had the right to assume that appellant had performed its duty to properly insulate every part of its wire, and to maintain such insulation. The duty of constant supervision and necessary inspection was appellant's duty. It was abundantly proved that the ground on which the deceased stood was not wet, but was dry. The question whether the deceased exercised ordinary care was fully presented to the jury, by instructions given at appellant's request, and we are satisfied with the verdict of the jury, which necessarily includes a finding that he did.

The judgment will be affirmed.

Affirmed.

**Philadelphia Savings Fund Society, Appellant, v.
Charles W. Lasher et al., Appellees.**

Gen. No. 18,981.

1. **MORTGAGES**—*character of, given by wife to secure husband's debt.* A wife who gives a mortgage to secure her husband's debt is bound as a principal.

2. **ELECTION**—*when may be rescinded even as against surety.* The holder of a mortgage security may rescind an election to declare the principal sum due and dismiss a bill to foreclose even as to a surety where the mortgage specifically provides for the right of rescission.

Foreclosure. Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1907. Affirmed in part, reversed in part and remanded with directions. Opinion filed November 12, 1908. Rehearing denied November 30, 1908.

MASON BROTHERS, for appellant.

LESLIE A. NEEDHAM, for appellees.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

June 22, 1905, appellant filed a bill against Charles W. Lasher and his wife, Jane E. Lasher, which was subsequently amended by making Charles W. Moeller a defendant, and in other particulars. The bill is to foreclose two mortgages executed to appellant by appellees, Charles W. Lasher and Jane E. Lasher, to secure payment of a promissory note of Charles W. Lasher of date April 11, 1903, for the sum of \$35,000, with interest at the rate of five per cent., payable semi-annually on the 11th day of October and in April in each year, till the principal sum should be fully paid, the instalments of interest being evidenced by coupon notes. One of the mortgages sought to be foreclosed is of the same date as the notes, April 11, 1903, and conveys to appellant lots 1 to 4, both inclusive, in block 18 in Butler, Wright & Webster's addition to

Philadelphia Savings Fund Society v. Lasher, 144 App. 653.

Chicago, Illinois, which is referred to as the Chicago avenue property, or the Chicago avenue and Orleans street property. The other mortgage is dated July 20, 1903, and conveys to appellant lots 18 to 21, both inclusive, in John S. Bussing's subdivision of block 10, in Wolcott's addition to Chicago, Illinois, and is referred to as the Dearborn avenue property. Each of the mortgages contains the following provisions:

"And it is stipulated and agreed that in case of default in any of said payments of principal or interest, as aforesaid, or of a breach of any of the covenants or agreements herein contained, then and in that case, the whole principal sum hereby secured, and the unpaid interest thereon, shall, at the option of the legal holder of said note (without notice thereof to said party of the first part, their heirs, assigns or legal representatives) becomes at once due and payable. And, after the exercise of such option, such legal holder may elect to revoke the same, and may receive any portion of said indebtedness hereby secured, and the rights of said party of the second part hereunder shall thereafter remain in full force, and be the same as to the remainder of such indebtedness, or any part thereof, as if such option had not been exercised, and such legal holder shall have the right to exercise such option and revoke the same in like manner, from time to time, in case of any such default or breach aforesaid, the rights of said party of the second part remaining the same, after any such revocation, as if such option had not been exercised."

By extension agreement, in writing, between appellant and Charles W. Lasher, of date February 24, 1898, the time of payment of the principal sum due, \$35,000, was extended till April 11, 1903, with interest at five per cent. payable semi-annually.

July 20, 1903, by written agreement between appellant and Charles W. Lasher, the time of payment was extended from April 11, 1903, till April 11, 1908, the said principal sum to be paid as follows: four payments of \$1,000 each on or before the 11th day of April in the years 1904, 1905, 1906 and 1908, with in-

terest thereon from April 11, 1903, and \$31,000 of the principal sum on or before April 11, 1908, with interest thereon until paid at five per cent. per annum, payable semi-annually on the first days of April and October.

May 28, 1904, appellant filed a bill to foreclose the mortgages for default in the payment of interest and \$1,000 principal payable April 11, 1904. June 1, 1904, suit was dismissed by appellant, the amount in default having been paid.

The present bill, filed June 22, 1905, avers that there is due to appellant \$34,000, with interest thereon at five per cent. from April 11, 1905, and \$850, with interest at seven per cent. from April 11, 1905, and \$1,750 as solicitor's fees.

The issues having been made up, the cause was referred to a master, who reported favorably for appellant and found and recommended as follows: "I find, therefore, that all the material allegations of the complainant's bill of complaint are proven and true, and recommend that the prayer of said bill for the foreclosure of said mortgages for the sum of \$39,899.60 be granted".

Appellees, Charles W. Lasher and Charles W. Moeller, filed objections to the master's report, which by the decree were ordered to stand as exceptions. No objections or exceptions were filed by Mrs. Lasher. March 23, 1907, the court rendered a decree sustaining the exceptions of Charles W. Lasher and Moeller as to lots 18 to 21, both inclusive, being the Dearborn avenue property above mentioned, and overruling said exceptions as to lots 1 to 4, both inclusive, being the Chicago avenue property above mentioned, and approving the master's report as to the Chicago avenue property and disapproving it as to the Dearborn avenue property, and finding that there was due to complainant the sum of \$37,689.60, with legal interest from November 22, 1906, the date of the master's report; also \$1,750 found due by said report as a rea-

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sonable solicitor's fee, under the provisions of the instruments sued on. The court dismissed the bill for want of equity as to the Dearborn avenue property and decreed a foreclosure of the mortgage of the Chicago avenue property.

The appellant has assigned errors and appellee, Charles W. Moeller, has assigned cross-errors.

Charles W. Lasher was the owner of the Chicago avenue property April 11, 1893, the date of the execution of the mortgage by him and his wife of that property. Subsequently, June 10, 1901, he purchased the property at a foreclosure sale, subject to the lien of appellant acquired by the mortgage of April 11, 1903, and a certificate of purchase was issued to him, which certificate he assigned to Jane E. Lasher December 15, 1905. The assignment is expressed to be "for value received". December 16, 1903, the master executed a deed to Jane E. Lasher, as assignee of the certificate of purchase, which deed contains the following: "Subject, however, to the lien of the principal note and all unpaid coupon notes secured by the mortgage set out in said bill, and whatever sum or sums of money may be due and payable, or may hereafter become due and payable, under the terms and provisions of said mortgage, to the respective holder or holders of said note and remaining interest notes". The bill for foreclosure, under the decree on which the foreclosure sale was had, was filed by Charles W. Lasher against Howard Copeland et al., and the bill sets forth Lasher's indebtedness to appellant and that he executed the mortgage of April 11, 1893, as security for the same. July 20, 1903, when the mortgage of the Dearborn avenue property was executed, Jane E. Lasher was the owner of that property. She became such owner March 28, 1901. Charles W. Lasher and Jane E. Lasher executed to appellee Moeller two quitclaim deeds, each dated June 22, 1905, one of their interest in the Chicago avenue property and the other of their interest in the Dearborn avenue property, the

expressed consideration in each deed being one dollar. It was admitted by counsel for Charles W. Moeller, appellee, in open court, that Moeller took said deeds *pendente lite*, and had no interest in the quit-claimed premises beyond that owned by the grantors. Therefore, Moeller stands in the shoes of his grantors in this suit. Counsel for appellee Moeller frankly admits that in December, 1903, the two mortgages were liens on the two properties and so continued till the transaction of May 28th, to June 14, 1904; but contends that Mrs. Lasher was, May 28, 1904, the owner of both the properties, and that, in executing the Dearborn avenue mortgage, she became surety for her husband's indebtedness, and that, as such surety, she was entitled to notice of appellant's revocation of its election of May 28, 1904, to declare the whole indebtedness due for default in payment. For greater certainty as to the exact contention of counsel, we quote the following under heading "C" in his brief of points:

"By the terms of the mortgages, appellant possessed the right, first, on default without notice, to declare the indebtedness at once due. Second, to revoke such election and receive any portion of principal or interest. Third, appellant's rights thereupon to be as though no election and revocation had been made. But appellant had no right to revoke its election of May 28, 1904, without notice to the surety, or to file a bill and incur costs, or to receive payment other than principal and interest".

Mrs. Lasher executed both mortgages and next following the provision in each mortgage giving to the legal holder of the secured note the option of declaring the whole indebtedness due, are the following provisions:

"And after the exercise of such option such legal holder may elect to revoke the same, and may receive any portion of said indebtedness hereby secured, and the rights of said party of the second part hereunder shall thereafter remain in full force *and be the same*

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as to the remainder of such indebtedness as if such option had not been exercised; and such legal holder shall have the right to exercise such option and revoke the same in like manner from time to time, in case of any such default or breach aforesaid, the rights of said party of the second part remaining the same after any such revocation as if such option had not been exercised''.

Therefore, when appellant revoked its election of May 28, 1904, to declare the whole indebtedness due, and dismissed its bill filed at that date, it was, by the very terms of the contract, in the same position as it would have been had such election not been made, namely, to again, from time to time, declare the whole indebtedness due, without notice, and to revoke such elections from time to time.

Benneson v. Savage, 130 Ill. 352, was a suit for the foreclosure of a trust deed. One ground of defense set up by plaintiffs in error, against whom the decree ran, was that the property in question was their property, and that, by virtue of the trust deed they were sureties for the indebtedness described therein, and that the trust deed was released without their consent. The court held against the contention, saying, among other things: "It is next objected that the mortgage was released by reason of the extension of the time of the payment of the debt without the consent of the mortgagors, Elvey W. Savage and Anna Wells, who were the real owners of the mortgaged property. The mortgage expressly recites, as was seen *supra*, that it is provided in the note which it secures, 'that the holder thereof may extend the time for the payment of the whole or of any part thereof, on the maker executing coupons for interest to accrue thereon during such extension'." In the present case express consent is given in plain, unambiguous terms, by the mortgages. In the written agreement of extension of the time of payment, of date July 20, 1903, between appellant and Charles W. Lasher, it is recited: "And whereas the said one principal note has become due

and is now owned and held by the society, and said Charles W. Lasher and wife have requested of said society an extension of the time of payment thereof; Now", etc.

Under date of July 30, 1903, the 10th day after the extension agreement of July 20th was executed, Mr. and Mrs. Lasher addressed to Mason Brothers, then solicitors for appellant, the following letter:

"GENTLEMEN: Learning from you that in the extension agreement, dated July 20, 1903, and in the mortgage of even date therewith, both relating to \$35,000 loan from The Philadelphia Saving Fund Society to Charles W. Lasher, there is a clerical error, stating that a certain mortgage originally and still securing said \$35,000 loan, was recorded April 15, 1893, whereas the actual date of recording was April 14, 1893, we hereby authorize correction to be made accordingly in said extension agreement and mortgage dated July 20, 1903, as fully and to all intents and purposes as though such correction had been made prior to the execution of said last mentioned agreement and mortgage, respectively.

Yours truly,

CHARLES W. LASHER,
JANE E. LASHER".

It is clear from this letter that Mrs. Lasher knew of the July 20th extension agreement and approved it, except as to the mistaken dates, which being true she is not in a position to complain of the revocation of the election of May 28, 1904, by the dismissal June 14, 1904, of the bill filed at the former date. Mrs. Lasher testified that she remembered of one extension and approved it. She also testified that she did not authorize an extension of the loan in 1904, which may mean that outside the mortgages she gave no express authority to extend it; but the evidence tends strongly to prove her husband acted as her agent in agreeing to the extensions and in respect to the property mortgaged. She testified that she expected her husband to attend to the loan, and that after the

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mortgage was made she left everything relating to the loan and the indebtedness and mortgage in Mr. Lasher's hands. She further testified that she was consulted by Mr. Lasher in matters of importance. Asked whether she was consulted with regard to the last written extension, she answered, "I don't know whether there was ever more than one. You say the last extension; I don't know just—I only remember one".

"Q. You were consulted as to that one, were you?

A. Yes.

Q. And you approved of that, did you not?

A. Yes, sir".

The evidence shows that leases of the properties were executed by Charles W. Lasher in his wife's name, by him as her attorney, and that he signed receipts for the rents, sometimes in his own name and sometimes in her's, as her attorney, and Mrs. Lasher testified that she never personally paid any taxes on the property, or any interest, and she supposed that Mr. Lasher paid the interest and taxes out of the rentals. We are of opinion, as between Mrs. Lasher and appellant, she is not to be regarded as a surety, but as a principal.

In Jones on Mortgages, 6th ed., vol 4, sec. 114, the author says that in states in which a married woman is capable of binding her separate property by contract, "she is bound as principal when she makes a mortgage to secure her husband's debts, and her liability is not affected by any understanding she may have with her husband, or by giving additional security as collateral to the mortgage"; citing *Alexander v. Bouton*, 55 Cal. 15, which case we have examined and find that it fully supports the text. By the law of this State the mortgages in question are as effective as against Mrs. Lasher as if she had been a *feme sole* when she executed them. Hurd's Rev. Stats. 1905, chap. 30, sec. 18, p. 466. But even though it should be held that Mrs. Lasher was a surety, this would

not operate to discharge the lien of the mortgage of the Dearborn avenue property, because in view of the terms of that mortgage appellant had the right to revoke the election of May 28, 1904, without notice.

The bill filed May 28, 1904, was dismissed in pursuance of an arrangement between appellant's solicitors and Charles W. Lasher and his attorney, Mr. Ulysses G. Hayden, on the payment by Mr. Lasher of the amount of principal and interest then due, and \$500 in addition. Mr. Lasher, in his examination in chief, calls the \$500 a bonus. On cross-examination he said he did not know how Mason Bros. applied the \$500, or what they called it. Both Henry B. and Henry D. Mason testified that the \$500 was paid as solicitor's fees for services performed in the suit which was dismissed, and that Mr. Hayden, whom Lasher had previously introduced to Mason Bros. as his attorney, paid the aggregate of the sums agreed on, including the \$500, and that they receipted for the items paid. We think the preponderance of the evidence is that the \$500 was paid by Mr. Lasher as a solicitor's fee for services in the former suit. With respect to this payment appellant's counsel objects that by the mortgages a solicitor's fee can only be allowed in case of a decree, and that the acceptance of payment was in violation of the rights of Mrs. Lasher, inasmuch as it leaves her liable to the same extent as if the payment had not been made. While it is true that by each of the mortgages there is no provision for the allowance of solicitor's fees, except by decree, it certainly does not follow that the payment by Mr. Lasher is necessarily prejudicial to Mrs. Lasher. *Non constat* that Mr. Lasher did not make the payment with his own money. That he so did must be presumed in the absence of evidence to the contrary. It is not included in the master's estimate of the amount due to appellant, or in the court's finding of the amount due, and so is not charged against the mortgaged premises. The foregoing includes all proposi-

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tions argued by counsel for appellee Moeller, and propositions not argued must be deemed waived. Our opinion is that the dismissal of appellant's bill for want of equity, as to the Dearborn avenue property, namely, lots 18, 19, 20 and 21 in John S. Bussing's subdivision of block 10 in Wolcott's addition to Chicago in the county of Cook and state of Illinois, is error, and the court should have decreed the foreclosure of both mortgages.

No assignment or cross-assignment of error questions the correctness of the court's finding of the amount due, which is the amount found due by the master, nor the allowance by the court of \$1,750 as a reasonable solicitor's fee; nor is it claimed by counsel for either party that such finding or allowance is incorrect or improper. That part of the decree dismissing the bill for want of equity as to the Dearborn avenue property, above described, will be reversed and the decree as to the Chicago avenue property, and in all other respects, will be affirmed, and the cause will be remanded with direction to enter a decree in conformity with this opinion. The appellant to recover its costs of this court and the Circuit Court.

Affirmed in part and reversed in part and remanded with directions.

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